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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-374

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

JAMES C. McCLOSKEY,
PAUL J. MARZULLO,
and THOMAS TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JAMES D. CRAWFORD,
Deputy District Attorney

RICHARD A. SPRAGUE,
First Assistant District Attorney

ARLEN SPECTER,
District Attorney

Room 666, City Hall,
Philadelphia, Pennsylvania 19107

OPINIONS BELOW

Opinion of the Court of Common Pleas of Philadelphia County quashing indictments against and suppressing evidence obtained from several defendants is unreported and is printed at pages 1a to 38a of the Appendix attached hereto. The identical orders of the Superior Court of Pennsylvania which, by an evenly divided court, affirmed without opinion the orders of the Court of Common Pleas are reported at 217 Pa. Superior Ct. 789, 790 (1970), and are printed at page 38a of the Appendix attached hereto. The opinion of the Supreme Court of Pennsylvania affirming in part and reversing in part the judgment of the Superior Court is reported at 443 Pa. 117 (1971), and is printed at pages 39a to 76a of the Appendix attached hereto. The unpublished order refusing reargument is noted at 443 Pa. 117, 118 (1971), and is printed on page 76a of the Appendix attached hereto.

JURISDICTION

The original order of the Pennsylvania Supreme Court was entered on May 13, 1971. Reargument was refused on June 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1247 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> no person . . . shall be compelled in any criminal case to be a witness against himself.

QUESTIONS PRESENTED

I. When repondent's were subpoenaed and appeared before the investigating grand jury with their private counsel, were advised of their right to consult counsel before and after their appearance and were aware that the grand jury was investigating criminal conduct did their failure to assert the privilege against self-incrimination amount to a waiver of the privilege?

II. When respondents appeared to be sworn before the investigating grand jury accompanied by counsel of their choice and were given a full opportunity to consult with counsel before entering the grand jury room, must the indictments returned by an indicting grand jury be quashed because the grand jury judge relied on private counsel to advise respondents of their right against self-incrimination and how to exercise that right instead of himself advising respondents of their rights on the record?

STATEMENT OF THE CASE

On March 30, 1969, the District Attorney of Philadelphia, Pennsylvania, filed a Petition to convene an Investigating Grand Jury for that County, alleging a breakdown of usual law enforcement procedures in connection with alleged offenses being committed by and against employees and agencies of the City and persons dealing with them in a large variety of specific areas mostly having to do with housing, urban renewal and public construction. The Court of Common Pleas granted this petition and charged the April Grand Jury of 1969 with the investigating function and that grand jury sat in continuous session for seventeen months from April of 1969, had called before it 539 witnesses and filed 15 presentments recommending a total of 2464 indictments against 46 individuals and 19 firms including city officials and persons dealing with them, involving a wide variety of offenses.

The Second Presentment of the investigating grand jury, filed in August 1969, dealt with the Philadelphia Housing Authority and recommended the indictment of its then recently resigned chairman, Frank M. Steinberg on charges of corrupt solicitation, malfeasance, misfeasance, misconduct in office and violation of the State conflict of interest law.

The Fourth Presentment of the investigating grand jury, filed on September 3, 1969, dealt with the construction of a new sports stadium in Philadelphia and described at great length evidence of improprieties in connection with the bidding, con-

tracting and actual construction of the stadium. In particular, it charged the general contractor, McCloskey & Co., Inc. and its executive Vice President, James McCloskey, together with the steel sub-contractor, H. H. Robertson Co. and its district manager, Thomas Taylor and the consulting engineers retained by the stadium architects, McCormick-Taylor Associates as well as the Director of Architecture and Engineering of the City, Paul Marzullo, with conspiring to cheat and defraud the City and with obtaining money and the City's signature to contracts by false pretenses and conspiring to commit this offense, as well as malfeasance and misconduct in office against Marzullo..

In the same presentment but separately stated, the Stadium Coordinator, Harry Blatstein, was charged with soliciting a bribe and malfeasance and misconduct in office and attempting to extort $10,000 from the losing bidder for the seating contract in the stadium, American Seating Company.

With respect to each of these separate presentments, the convening Judge appointed by the Administrative Judge as in charge of the grand jury, accepted the presentments in open court and directed the District Attorney in accordance with Rule 212(c) of the Pennsylvania Rules of Criminal Procedure to prepare appropriate bills of indictment for submission to an indicting grand jury in accordance with the recommendations in each presentment. Following this order of the Court, the District Attorney submitted such bills to the regular grand juries and indictments were returned against Steinberg by the September grand jury and against the stadium defendants by the October

grand jury of 1969. An additional consolidated indictment against the principal stadium defendants was obtained on the basis of the same presentment from the January 1970 grand jury charging one general conspiracy among the six defendants there involved.

Prior to the submission of the bills of indictment to the October grand jury, all of the defendants named in the Fourth Presentment filed with the Judge in charge of the October grand jury (Judge Spaeth) motions demanding preliminary hearings prior to submission, motions restricting the character of the evidence to be submitted to the grand jury and insisting that, rather than simply offering the presentment to the grand jury, live witnesses be called before the indicting grand jury and other motions of similar tenor challenging the right to proceed in accordance with the order of the convening Judge. These motions were all denied by Judge Spaeth in an opinion dated October 24, 1969, which, in substance, held that in the case of defendants named in presentments of an investigating grand jury, no preliminary hearing was required by the rules and that the Commonwealth had the right to proceed to the indicting grand jury on the basis of the presentment alone.

Witnesses called before the Grand Jury were sworn in open Court by the convening Judge. A number of them, including all of the defendants in this case, were represented by counsel at the time of their appearance. Uniformly they moved that counsel be permitted either to accompany them in the grand jury room and consult there or that they be permitted to consult with counsel outside of the

grand jury room as to each and any question on which they wished to consult. At the outset convening Judge ruled that witnesses would be permitted to consult with their counsel before entering and after leaving the grand jury room but would not be permitted to consult on a question by question basis. However, he also ruled that if a witness did not wish to answer any question, such matters should be taken up before the Court, at which time the witness would be given opportunity to consult with his own counsel.

It was stipulated before the Court below at the hearing on the motions to quash and to suppress that none of the individual defendants, with the exception of Thomas Taylor, made any request in the course of his questioning before the grand jury to consult with counsel. Thomas Taylor testified that he had made such a request; the court stenographer testified that no such request was made in her hearing. The Court below found as a fact that no such request was made. Neither did any of the defendants on appeal below refuse to answer any question before the grand jury, except Frank M. Steinberg.

As noted above, a large number of witnesses was called before the grand jury, some of whom pleaded the Fifth Amendment as to some or all of the questions asked of them. In each instance where the Commonwealth desired to compel their testimony, they were taken before the Court with their counsel who was provided with a transcript of the questioning before the grand jury and the Court was then asked to rule on each question where the witness asserted a right not to answer. For the convenience of the witness and the grand jury, these

questions were uniformly put aside until the completion of the testimony of the witness at least as to those questions he was willing to anwer so that a minimum of interruption would be suffered in the continuity of testimony before the jury. In some cases, the Court, after hearing arguments of counsel. ordered the witnesses to answer the questions; in other cases the Court sustained a plea of privilege.

The present respondents filed pre-trial motions to suppress their testimony (and any fruits thereof) and to quash the indictments for lack of complaint and preliminary hearing as well as on the ground that their testimony, obtained without counsel, as above stated, was used to obtain the indictments

The Common Pleas Court, in a departure from its earlier ruling, granted all of these motions on grounds which raise pure questions of law and the Commonwealth appealed to the Superior Court of Pennsylvania which, on September 25, 1970, affirmed without opinion by an equally divided court. The Commonwealth's Petition to the Supreme Court of Pennsylvania followed.

On May 13, 1971, the Supreme Court of Pennsylvania reversed in part, and affirmed in part *Commonwealth v. McCloskey*, 443 Pa. 117 (1971). Reargument was sought by certain defendants but denied June 14, 1971. In reversing the order of the Common Pleas Court quashing indictments against Harry Blatstein, Frank M. Steinberg, McCormick-Taylor Associates, McCloskey and Co., Inc., and H. H. Robertson Company the Court held that an indictment based upon an investigating

grand jury's presentment directly to an indicting grand jury with leave of court is lawful, even though no preliminary hearing was held.

In affirming the orders of the Common Pleas Court quashing indictments against James C. McCloskey, Paul J. Marzullo, and Thomas Taylor the Court held that a subpoenaed witness, who has given testimony before an investigating grand jury without express warning that should he be doubtful as to whether he can properly refuse to answer a particular question he can come before the court with counsel and obtain a ruling as to whether he should answer the question, has been denied his right against self-incrimination.

The Supreme Court of Pennsylvania included in its written opinion a portion of the record of the grand jury proceedings, wherefrom it concluded that respondents McCloskey, Marzullo, Taylor and Steinberg had not been given the newly required warning, and that Blatstein had been given such warning. (*See* 443 Pa. at 140-41, n. 29.) The Court then upheld the quashal of those indictments against McCloskey, Marzullo and Taylor which were based in part on the incriminating testimony they gave before the grand jury without the above warning. The indictment against Steinberg was not quashed since he exercised his Fifth Amendment rights before the grand jury and only testified as to his name and address.

Review of the latter part of this opinion—affirming the order quashing the indictments against these three respondents—is now sought in this Court.

ARGUMENT

I. Respondents, Who Were Subpoenaed and Appeared Before the Investigating Grand Jury, Were Represented by Counsel of Their Own Choice, Were Advised of Their Right to Consult Counsel Before and After Their Appearance, and Were Aware that the Grand Jury Was Investigating Criminal Conduct, Waived Their Privilege Against Self-Incrimination by Testifying Before the Grand Jury Without Asserting the Privilege.

In upholding the quashal of the indictments against respondents McCloskey, Marzullo and Taylor, the Supreme Court of Pennsylvania ruled that each of these respondents had been denied the right against self-incrimination enjoyed by a witness before the grand jury. It is the Commonwealth's position that when each of the respondents appeared to be sworn before the grand jury accompanied by privately retained counsel of his choice, took the oath, entered the grand jury room and there testified without asserting his Fifth Amendment claim, he waived his right not to incriminate himself. Nor is there any basis in the Constitution or the decisions of this Court to support the holding of the Pennsylvania court that this failure to assert the privilege cannot be a knowing and intelligent waiver unless the waiver is given an explicit warning before he enters the grand jury room that he may refuse to answer. The general question of waiver will be discussed here; the nec-

essity of the new warning requirement in the succeeding section of this petition.

It should be noted at the outset that this case involves only the Fifth Amendment right against self-incrimination and not the Sixth Amendment right to counsel. While the original Opinion of Judge Spaeth in the Court of Common Pleas held that respondents had been denied the right to counsel, the Pennsylvania Supreme Court found otherwise on the basis of the uncontradicted case law authority of the decisions of this and lower courts:

> In his July, 1970, opinions, Judge Spaeth ruled that appellees were entitled under the Fifth and Sixth Amendments to consult with their lawyers outside the grand jury room during their testimony. He based his ruling on the United States Supreme Court decisions in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), as well as the decision of the New York Court of Appeals in People v. Ianniello, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439, cert. denied, 393 U.S. 827, 89 S.Ct. 90, 21 L.Ed.2d 98 (1968). We cannot agree.
>
> Neither *Escobedo* nor *Miranda* were even remotely concerned with right to counsel before an investigating grand jury. The interpretation urged by appellees that counsel be accessible at all times during a witness's appearance is an unwarranted extension of the teaching of those de-

cisions. As to *Ianniello*, we believe it supports the result we reach today, as appears more fully below.

In *In re Groban's Petition*, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957), the last pronouncement by the Supreme Court directly on this issue, it was held that "[a] witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel". When "charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense." Id. at 333, 77 S.Ct. at 513.

It would be a serious interruption and impair continuity in a grand jury investigation if witnesses were permitted to leave the room and consult with counsel prior to responding to every question.

(443 Pa. at 141-42.)

The court then continued its reading of *In re Groban's Petition*, 352 U.S. 330 (1957), and held that a witness before the grand jury does have available the privilege against self-incrimination.

Petitioner recognizes that the privilege against self-incrimination is available to the grand jury witnesses. But the privilege has not been violated here where it was *specifically protected* by the grand jury judge's procedure, and was thereafter waived by *these* respondents when they chose to testify.

The procedure which the Honorable Joseph Sloane, the judge who presided over the April

Term, 1969, Grand Jury adopted to protect the Fifth Amendment rights of witnesses before the grand jury were established as early as April 22, 1969, when the jury began its investigative function.[1] These rulings were followed throughout the

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[1] The question of how a witness was to be allowed to invoke his right not to incriminate himself was resolved early in the life of the investigating grand jury on the motion of counsel for the first witnesses before the grand jury who might have faced a possible self-incrimination problem. The following excerpt from the records of the grand jury, containing these initial rulings, is reprinted from the appendix to the Commonwealth's brief in the Supreme Court of Pennsylvania:

IN RE: THE INVESTIGATING GRAND JURY OF APRIL TERM 1969.

Room 480 City Hall
Philadelphia, Pa.
April 22, 1969.

Before: HONORABLE JOSEPH SLOANE, J.

APPEARANCES:

ARLEN SPECTER, Esq., District Attorney of Philadelphia.

RAYMOND J. BRADLEY, Esq., LOUIS J. GOFFMAN, Esq., Wolf, Block, Schoor & Solis-Cohen for David Solms.

ROBERT L. TRESCHER, Esq., for Sander Field.

• • •

MR. BRADLEY: For the record, sir, we do object on behalf of Mr. Solms to his being sworn in open court. And we request permission of Your Honor to accompany him to the Grand Jury room and be present with him. And we also object to the taking of any transcription while he is in the Grand Jury room.

THE COURT: Of course, I might have added to my ruling—I just thought of it—that if Mr. Solms or any other witness when he is asked a question decides that he will not answer it, the propriety or impropriety of that refusal to answer will be adjudicated by the Court. And certainly he has a right to say, "I will not answer that question," because of reasons he may want to give. And then, whether he does or does not have to answer the question will have to be resolved by the Court. But I have made the rulings, Mr. Bradley, and your objections are noted. And exceptions to my rulings are indeed granted.

MR. BRADLEY: Does Your Honor then deny those requests that I have just made?

THE COURT: I deny those.

MR. BRADLEY: I make two further requests, Your Honor. One, in light of Your Honor's ruling that I may not accompany the witness into the Grand Jury room, I request that the witness be given permission to leave the Grand Jury room to consult with his counsel at such times as he might feel that it is appropriate during the course of the questioning.

THE COURT: That's not my ruling. That's the reverse of my ruling. He may not leave the Grand Jury room to consult with you. He may, if he so desires, say, "I shall not answer that question." And if he wants to, he may give a reason. If not, if he doesn't give a reason, then the question and the witness will be brought before this Court, and we hope we will give whatever wise judgment is to be given after hearing the question.

MR. TRESCHER: May I ask for a clarification on that, Your Honor Do I understand that if a witness chooses not to answer a question, sir, that he then may appear with counsel before you?

THE COURT: Right.

MR. TRESCHER: And that if it appears to counsel that he should answer, he can so advise him, and that he may go back and answer without contempt charges?

THE COURT: Well, that will be in open court, Mr. Trescher, before me, with his counsel present at that point. Since he has refused to answer a question, the question and the witness will be brought before me in open court, with his counsel present. I may modify that if I see that it becomes an impractical way of doing it. For example, whoever is interviewing the particular witness may be permitted to finish his interrogation as to every other question that the witness is willing to answer and then just bring before the Court the question or questions that he won't answer.

MR. TRESCHER: I am not suggesting, Your Honor, that–

THE COURT: You see, I am fearful–not fearful–but I can understand how impractical it would be if a question is asked of a witness and the witness says, "I won't answer," they then come into open court, with his lawyer present, and we go back and forth that way. That may turn out to be impractical. I don't know yet. And maybe we may experiment that way, gentlemen, to see how it goes. But if the Assistant District Attorney is questioning a particular witness and the witness says as to one question, "I will not answer that question," I am wondering why the District Attorney or Assistant District Attorney who is questioning that particular witness cannot say to him, "Well, I'll go onto another question"–unless he feels that the one question that is not answered cannot remain unanswered at that point.

life of the investigating grand jury, both before and after the appearance of the present respondents as witnesses before that body.[2]

MR. SPECTER: Judge Sloane, we would seek to do just that.

MR. TRESCHER: But suppose the witness is perplexed as to whether his answer might incriminate him under the Federal or the State Constitution, Your Honor, and he wants guidance on that subject?

THE COURT: If he has a doubt—

MR. TRESCHER: Would he then be required to explain in open court why it might incriminate him?

THE COURT: Well, let's wait until that happens, and maybe we will have a conference and decide it. At this point, I don't know. I do think that we ought not to disturb the regularity of the proceedings—and I was thinking of that—by having the Grand Jury interrogation stopped at every question until that question is decided. We couldn't possibly do that, I don't think.

[2] A typical example of the operation of the grand jury when a witness wanted not merely to invoke his privilege against self-incrimination, but to consult with counsel before making such a claim, also reprinted from the appendix of the Commonwealth's brief in the court below, will illustrate the procedure followed.

The record shows that James J. O'Neill's testimony was interrupted so that he could consult with counsel in proceedings on December 15, 1969, as follows:

BEFORE THE INVESTIGATING GRAND JURY
OF APRIL TERM, 1969.

TESTIMONY OF JAMES J. O'NEILL.

Room 613, City Hall
Philadelphia, Pa.
Monday, December 15, 1969 at 2:15 o'clock P.M.

PRESENT:

ROBERT E. GABRIEL, Esq., and JOHN ROGERS CARROLL, esq., Assistant District Attorneys.

(The witness's testimony then covered 23 pages of notes of testimony, with the witness answering some questions and declining to answer other questions. His testimony concluded at Pages 22 and 23, when he responded to a specific question as follows:)

• • •

Not only did the procedures adopted by Judge Sloane provide a practical and effective method to protect Fifth Amendment rights, but the propriety of this procedure was explicitly approved by the lower federal courts in another case which sought to attack the investigating grand jury. See *National Land & Investment Co. v. Specter*, 304 F. Supp 1004, 1012 (E.D. Pa. 1969) *aff'd*, 428 F.2d 91 (3d Cir. 1970):

> The plaintiff's first objection to the ruling of the state court that they are unable to have the assistance of counsel before the Grand Jury, and that they are unable to leave the Grand Jury

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A. I respectfully refuse to answer the questions on the grounds that the answer may tend to incriminate me, and in justification of my refusal I plead the 5th Amendment to the Constitution of the United States, Section 1 of the 14th Amendment to the Constitution of the United States, and Section 9 of the Constitution of the Commonwealth of Pennsylvania.

Q. Now, I understand, sir, that you would like an opportunity to consult with your attorney with reference to the questions that have been put to you, with the idea being you will be guided by what your attorney tells you in terms of whether or not you are going to answer questions that have been put to you; is that right, sir?

A. That is right.

Q. How long will it take you to consult with counsel of your choice?

A. Well, I don't know, two or three days.

Q. Is it necessary that we give you another subpoena to appear here Thursday morning?

A. I don't believe so.

Q. Then, consider the fact that you are under subpoena and you will return here 9:30 on Thursday morning with your attorney. We will expect you at that time to have consulted with counsel of your choosing, to have discussed these questions and other questions from the questions that we have put to you, sir, and we will expect you to answer these questions, or if you refuse to answer, then, of course we will have a hearing before Judge Sloane; you understand that?

A. I do.

at will to consult with their attorney. Pursuant to the order of the Court, the plaintiffs who have been called before the Grand Jury have been permitted to consult with their attorney before testifying, after testifying, at intermission of the Grand Jury's deliberations, and when they raise a claim of privilege which is taken before the Court for a ruling. There is overwhelming precedent that these procedures are constitutionally unobjectionable. In *In re Groban*, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376 (1957), the Supreme Court countenanced proceedings under an Ohio Statute in which a Fire Marshal held investigatory proceedings to determine the cause of fires. Under the applicable statute, the Marshal was empowered to make the proceedings private and to "exclude from the place where [the] investigation is held all persons other than those required to be present", 352 U.S. 331, 77 S.Ct. at 512. The Court there concluded that:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. ° ° ° A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. ° ° ° Obviously ° ° ° evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then

his protection is the privilege against self-incrimination." 352 U.S. 330 at 332-333, 77 S. Ct. 510 at 513, 1 L.Ed.2d 376. See also Jones v. United States, 119 U.S. App.D.C. 284, 342 F.2d 863, 882 (1964); In re Black, 47 F.2d 542, 543 (2nd Cir., 1931); Directory Services, Inc. v. United States, 353 F.2d 299, 301 (8th Cir. 1965); United States v. Wolfson, 282 F.Supp. 772 (S.D.N.Y.1967); United States v. Goldenberg, 276 F.Supp. 898, 900 (S.D. N.Y.1967).

This procedure existed throughout the grand jury. Thus, had any of respondents requested an opportunity to confer with counsel on what they conceived to be a difficult question concerning self-incrimination, they would, no doubt, have been allowed to do so as was every other witness who made such a request was permitted to do. Certainly, had any of respondents invoked their Fifth Amendment rights, they would have brought the questioning to a halt pending a ruling on the claim. In fact, at least twenty-five other witnesses before the grand jury did effectively plead the privilege. As noted earlier, Frank Steinberg, appellee below, who received no cautionary instructions upon being sworn as a witness, effectively exercised his Fifth Amendment rights by refusing to state more than his name and address.

Respondents McCloskey, Marzullo and Taylor simply chose not to exercise their privilege against self-incrimination. As distinguished from many of the other witnesses, they never refused to answer any question on self-incrimination grounds, nor did

they ever even request to leave the grand jury room to consult with their private counsel waiting outside. By their failure to assert their self-incrimination claims, respondents waived them. As this Court held in *Rogers v. United States,* 340 U.S. 367, 370 (1951):

> If the petitioner desired the protection of the privilege against self-incrimination, (he) was required to claim it. ° ° ° The privilege "is deemed waived unless invoked." United States v. Murdock, 1931, 284 U.S. 141, 148, 52 S.Ct. 63, 64, 76 L.Ed. 210.

This principle has been reaffirmed by this Court as recently as last year in *United States v. Kordel,* 397 U.S. 1, 10 (1970). See also *Robinson v. United States,* 401 F.2d 248, 250 (9th Cir. 1968) ("Undoubtedly, the defendant, when questioned by the grand jury as to whether he had bought beer from Davis, had the right to claim his privilege against self-incrimination and refuse to answer. But he did not claim the privilege, and the Government was under no duty to suggest to him that he claim the privilege."); *United States v. Luxenberg,* 374 F.2d 241, 246 (6th Cir. 1967); *United States v. Klein,* 124 F.Supp. 476, 479 (S.D.N.Y. 1954); *United States v. Miller,* 80 F.Supp. 979, 982 (E.D Pa. 1948).

Under the circumstances of this case, it is impossible to imagine that these respondents, who were continuously represented by most able and industrious private counsel long before they testified, and who were aware of the investigatory nature and areas of inquiry of the grand jury, were

unaware of their privilege against self-incrimination. The unescapable conclusion under these circumstances is that these respondents were advised, and chose to waive the privilege and answer all questions before the grand jury.

II. When a Witness Appears To Be Sworn in for His Appearance Before the Grand Jury Accompanied by Counsel of His Choice and Is Given a Full Opportunity to Consult with That Counsel before Entering the Grand Jury Room, the Grand Jury Judge Need Not Warn the Witness of His Right Against Self-Incrimination But May Rely of Counsel To Do So.

In fact, the Supreme Court of Pennsylvania did not question the need for a witness before the grand jury to assert his right against self-incrimination. Nor did the Court hold that such a witness must be warned of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), before the Fifth Amendment waiver can be knowing and intelligent or that the witness has the right to have counsel with him before the grand jury. But, having made all of these rulings, the court then created an entirely new warning for witnesses before the investigating grand jury whose absence, the court held, vitiated any indictment based on this testimony. Specifically, the Supreme Court of Pennsylvania held that each of the respondents should have been warned that he had a right to refuse to answer questions until he had a chance to consult with his counsel during a recess of the grand jury so that he would

have the benefit of counsel's advice before claiming the privilege. And the Court held that it was not enough that each of the respondents was represented by able counsel who could similarly have advised their clients before the clients entered the grand jury room and that it was the practice of the grand jury to excuse witnesses who believed they needed time to consult with counsel before making a Fifth Amendment claim. In doing so, the Court below created another new warning which must be given to potential defendants at pain of having an otherwise completely unblemished criminal charge forever dismissed.

There was, of course, no need for this novel ruling. Respondents were never in any danger from making a claim of the Fifth Amendment privilege whenever they had any fear that they might incriminate themselves. The law has always been clear—and so defendants must have been warned by their counsel—that no claim of the privilege is punishable by contempt until the matter is brought into open court for a ruling at a time when the witness has had a chance to consult with counsel and is represented by counsel before the court. This procedure was described by this Court in the leading case of *Brown v. United States*, 359 U.S. 41, 49-50 (1959) where the Court said:

> When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer. Unless, therefore, it was to be frustrated in its investi-

> gative purpose, the grand jury had to do exactly what it did—turn to the court for help. If the court had ruled that the privilege against self-incrimination had been properly invoked, that would have been the end of the matter. Even after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer.

Thus, even before the Pennsylvania Supreme Court's ruling in this case, counsel had every reason to advise respondents of the wisdom of claiming the Fifth Amendment right on all doubtful questions. And the grand jury judge and the prosecuting attorney had every reason to rely on able privately retained counsel of respondent's own choice to warn respondents of their rights and how these rights might best be exercized before the grand jury.

Not only was the Pennsylvania Supreme Court's new rule concerning warnings of grand jury witnesses unnecessary in the face of the availability of able counsel to advise such witnesses, but it was entirely unprecedented. Thus, in *United States v. DeMichele*, 375 F.2d 949 (3d Cir. 1967), *cert denied*, 389 U.S. 838, a decision after *Miranda* and its related cases, the Court of Appeals, relying on the fact that the defendant had had two weeks before his appearance before the grand jury in which to consult with counsel, upheld the defendant's conviction for perjury before the grand jury holding:

> Appellant's entire argument is based upon the theory that the law should be changed to provide that a witness before a grand jury must be warned of his right to counsel and his right against self-incrimination . . . he (appellant) confines himself to the contention that he received no warnings of any kind *when he* appeared before the grand jury. He *substantially concedes, as is the fact, that under existent law a grand jury witness is not entitled to a warning of right to counsel and to remain silent. United States v. Miller*, 80 F.Supp. 979 (E.D. Pa. 1948); *United States v. Ponti*, 257 F.Supp. 925 (E.D. Pa. 1966); *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955); *United States v. Parker*, 244 F.2d 943 (7th Cir. 1957); *United States v. Orta*, 253 F.2d 362 (5th Cir. 1958); *United States v Winter*, 348 F.2d 204 (2d Cir. 1965). (partial emphasis added.)

In *United States v. Miller*, 80 F.Supp. 979 (E D. Pa. 1948), where another perjury conviction of a grand jury witness was sustained, the court explicitly outlined the rights of a witness before the grand jury.

> At the (grand jury) hearing, the witness may, if he so desires, rely on his constitutional privilege of refusing to respond to questions the answers to which would reveal facts or circumstances which might tend to incriminate him . . . [citing cases] Provided no fraud or duress is used upon the witness, there is no obligation upon the attorney for the Government to warn him of his constitutional

privilege or the dangers of self-incrimination . . . [citing numerous cases at 80 F.Supp. 981-82]. The witness, upon oath must claim his privilege in no uncertain terms at the proceeding in which the information is sought or he will not thereafter be considered to have been "compelled" within the meaning of the Amendment . . . (citing numerous cases at 80 F.Supp. 982).

In a later case, *United States v. Gilboy*, 160 F.Supp. 442 (M.D. Pa. 1958), where the grand jury witness had subsequently been convicted, not of perjury before the grand jury but of conspiracy to defraud the United States, the court stated that:

> The mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the V Amendment when summoned to give testimony before a Grand Jury. United States v. Scully, supra, 225 F.2d at page 116;[18] United States v. Parker, 7 Cir., 1957, 244 F.2d 943. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated, which might tend to incriminate him. United States v. Benjamin, supra, 120 F.2d at page 522; see Wigmore Id. § 2268. The privilege is " ° ° ° an option of refusal, not a prohibition of inquiry."

While the government may not practice deception, fraud or duress upon an accused to obtain evidence, it is not required to advise him of his rights as to self-incrimination. Wilson v. United States, 1896, 162 U.S. 613, 624, 16 S.Ct.

895, 40 L.Ed. 1090; Powers v. United States, 1912, 223 U.S. 303, at pages 313, 314, 32 S.Ct. 281, 56 L.Ed. 448; Thompson v. United States, 7 Cir., 1926, 10 F.2d 781, at page 784; Knoell v. United States, 3 Cir., 1917, 239 F. 16, at page 21; Mattes v. United States, 3 Cir., 1935, 79 F.2d 127, 128; Nicola v. United States, 1934, 3 Cir., 72 F.2d 780; Pulford v. United States, 6 Cir., 1946, 155 F.2d 944, at page 947.

Similarly in *United States v. Scully*, 225 F.2d 113 (2d Cir.) (*Medina, J.*), *cert. denied* 350 U.S. 897 (1955), where the defendant was likewise convicted of conspiracy to defraud the United States, the Court of Appeals for the Second Circuit held that the mere possibility, existing at the time the witness appeared before the grand jury, that he might later be indicted furnished no basis for requiring that he, at the time of appearance before the grand jury, be advised of his rights against self-incrimination. Before reaching their conclusion the *Scully* court recited facts very similar to the case before this Court.

> Nor does it appear that he was unaware of his rights or that, had he been warned, he would not have testified as he did. Indeed, he testified without demur, consulted a lawyer and then voluntarily gave further testimony before the Grand Jury.

(225 F.2d at 114).

Of even greater similarity to the instant case is *United States v. Klein*, 124 F.Supp. 476 (S.D.N.Y.

1954) (*Palmieri, J.*), where the District Court held that where witnesses before the federal grand jury were represented by counsel, and did not claim that they did not know of their right to refuse to answer questions which might incriminate them, the United States Attorney had no duty to inform the witnesses as to the privilege, and they were not entitled to have the subsequent indictment against them dismissed because the United State Attorney did not inform them of the privilege.

In reaching this result the court said:

> Defendants seek to bring themselves within the compass of the cases that state that a defendant in a criminal case cannot be compelled to testify before a grand jury on matters pertaining to that case. See United States v. Lawn, D.C.S.D.N.Y. 1953, 115 F.Supp. 674. But these cases are not applicable because defendants were not charged with the commission of any offense against the United States when they appeared before the grand jury At that time defendants were witnesses, and although it was probable that the grand jury would, as it did, subsequently indict them, they are not entitled to the protection that is afforded a defendant. United States v. Scully, D.C.S.D.N.Y. 1954, 119 F.Supp. 225 Therefore, defendants' rights were not violated when they were subpoenaed to appear and testify before a grand jury; United States v. Scully, supra; United States v. Wilson, D.C. Del. 1942, 42 F.Supp. 721; and if they desired the protection of the privilege, they should have claimed it. See United States v. Monia,

1943, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376; United States ex rel. Vajtauer v. Commissioner of Immigration, 1927, 273 U.S. 103, 47 S.Ct. 302, 71 L.Ed. 560.

Defendants urge upon the Court that when persons who are likely to be indicted are called as witnesses before a grand jury, the United States Attorney should be required to inform them of their privilege under the Fifth Amendment. Cf. Federal Rules of Criminal Procedure, rules 5(b) and 40(b)(2), 18 U.S.C.A. However, defendants (two of whom are lawyers and all of whom were represented by counsel) do not claim that they were ignorant of the privilege, and that if they had known of it they would not have answered the questions put to them. They have failed to make any showing of fraud, duress, or deception on the part of the Government which they contend resulted in their testifying before the grand jury. It is clear that under such circumstances, a United States Attorney is not required to inform a grand jury witness who is under suspicion of his privilege. Powers v. United States, 1912, 223 U.S. 303, 32 S. Ct. 281, 56 L.Ed. 448; United States v. Scully, supra; United States v. Wilson, supra; see Wilson v. United States, 1896, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090; Pulford v. United States, 6 Cir., 1946, 155 F.2d 944, 947-948; 8 Wigmore on Evidence §2269 (3d ed. 1940). The defendants have placed great emphasis upon the statement of the Assistant United States Attorney, made upon the argument of these motions, to the effect that at the time of the grand jury proceedings, he believed

that there was a strong possibility that information the Government then had in its possession would lead to the indictment of the defendants Haas and Alprin. But it is quite apparent that the defendants and their counsel were well aware of this possibilty. Moreover, the applicable rules of law are not affected by the state of mind of Government counsel.

Nor can I conclude on the basis of the affidavits before me that the defendants were in any way overreached or that substantial justice was frustrated. It would seem that, far from being deprived of their rights, the defendants have sedulously availed themselves of their rights at every stage of the proceedings. Having failed to invoke the privilege under the Fifth Amendment in good time, they cannot be heard to say that they would now decide otherwise and that the indictment should be dismissed upon their tardy assertion of privilege.

(124 F.Supp. at 478-79).

The same reasoning is certainly applicable in this case. Respondents have always been represented by the most able of counsel, privately chosen and retained, who have actively and zealously defended their clients' interests. Nor have respondents ever claimed that they were ignorant of their privilege against self-incrimination. Nor have they claimed that had they known of the privilege they would not have answered the questions put to them. Finally, there has been absolutely no showing of fraud, duress, or deception on the part of the Commonwealth which resulted in their testifying before the grand jury.

In the more recent case of *United States v. Luxenberg*, 374 F.2d 241 (6th Cir. 1967), which sustained convictions of grand jury witnesses for conspiracy to misapply and defraud a licensee of the Small Business Administration, the Court of Appeals for the Sixth Circuit stated:

> Both defendants assign as error the trial judge's denial of their motion to dismiss the indictment on the ground that it was based on their testimony before the grand jury in violation of their privilege against self-incrimination. The fifth amendment's privilege against self-incrimination in criminal cases is applicable in proceednge before a grand jury. United States v. Monia, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376; Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110. The extent to which one must be advised of this right depends upon whether one is a defendant in custody of the authorities or whether one is merely a witness. One who is a defendant must be advised that he may refuse to answer incriminating questions and that anything he says may be used against him. A person testifying before a grand jury as a witness need not be so advised, but does retain the right to decline to give an incriminating answer. Stanley v. United States, 245 F.2d 427 (C.A.6); United States v. Benjamain; 120 F.2d 521 (C.A.2); Mulloney v. United States, 79 F.2d 566 (C.A.1), cert. den. 296 U.S. 658, 56 S.Ct. 383, 80 LEd. 468. This Court has held that a person who is virtually in the position of a defendant must be accorded the same rights as a defendant. Stanley v. United States, supra. Consequently a person against

whom the prosecuting attorney is not seeking an indictment need not be advised of his right to refuse to answer incriminating questions. United States v. Parker, 244 F.2d 943 (C.A.7), cert. den. 355 U.S. 836, 78 S.Ct. 61, 2 L.Ed.2d 48. The fact that a person appeared in the capacity of a witness and testified before a grand jury without being so advised, does not furnish a basis for dismissing an indictment subsequently returned against such individual based, in part, upon his testimony. United States v. Scully, 225 F.2d 113 (C.A.2), cert. den. 350 U.S. 897, 76 S.Ct. 156, 100 L.Ed. 788. It is the duty and right of such witness to invoke the privilege against self-incrimination and refuse to answer questions.

The stipulated facts in this case demonstrates that this assignment of error is without merit. Zimmerman and Luxenberg testified before a grand jury investigating the business operations of Mervin Gold. Neither was advised of his right to refuse to answer incriminating questions. On the basis of this and other testimony, the grand jury returned indictments against both defendants. The crucial fact stipulated by the parties was that no "criminal proceedings were pending, or threatened against either of them; ° ° ° nor ° ° ° (was) the United States ° ° ° then seeking an indictment against either of them."

(374 F.2d at 246 (footnote omitted)).

Certainly the respondents in the present case were neither defendants in custody of the authorities nor persons in a position equivalent to such

defendants. None of the respondents here involved was mentioned in the grand jury petition, no indictments were pending against any of the respondents, nor had any charges been made against these respondents until the issuance of the persentment of the grand jury. Moreover, not only were the respondents here able to be fully advised of their rights prior to their entry into the grand jury room by their own retained counsel, but they had to face not an indictment, but merely a presentment recommending that a second grand jury indict respondents.

Thus, the Supreme Court of Pennsylvania has misinterpreted the constitutional privilege against self-incrimination and the decisions of this Court defining the circumstances under which a defendant must be advised of both this right and his right to consult with counsel in order to knowingly and intelligently waive that Fifth Amendment right. Since each of the respondents was accompanied to the door of the grand jury room by competent counsel who were fully able to warn their clients of their rights under the Fifth Amendment and of the time-honored procedure by which alone testimony could be compelled under identical state and federal law, there was no justification whatever for this novel constitutional interpretation.

CONCLUSION

For the foregoing reasons the Commonwealth respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

JAMES D. CRAWFORD
Deputy District Attorney

RICHARD A. SPRAGUE
First Assistant District Attorney

ARLEN SPECTER
District Attorney

APPENDIX

A. Opinion and Order of Court of Common Pleas of Philadelphia County

NATURE OF THE CASE

This case is before the Court on a motion to quash the indictments, defendant alleging that the indictments were based at least in part on testimony obtained in violation of his constitutional rights.

HISTORY OF THE CASE

On September 4, 1969, the Investigating Grand Jury of April Term, 1969, returned its Fourth Presentment, which asked The Honorable Joseph Sloane, in charge of the Investigating Grand Jury, to direct the District Attorney "to present to an indicting Grand Jury appropriate bills of indictment" charging defendant with various offenses incident to the construction of a sports stadium in Philadelphia. (Fourth Presentment, p. 41.) Judge Sloane accepted the Presentment and stated that "it will be submitted in indictments . . . to a subsequent indicting grand jury". (Proceeding of September 4, 1969, relating to the Fourth Presentment of the Investigating Grand Jury of April Term, 1969, p. 3.)

On October 3, 1969, defendant filed a petition with this Court, in charge of the October Grand Jury, asking, generally, that this Court stay the District Attorney from presenting bills of indictment against defendant to the October Grand Jury until the District Attorney had made out a *prima*

facie case against defendant at a preliminary hearing, or, if the Court would not grant that relief, that it impose certain conditions upon the manner in which evidence against defendant should be presented to the October Grand Jury.

On October 24 the Court filed an order dismissing defendant's petition, stating its reasons in an opinion accompanying the order. *In re Petition of H. H. Robertson Company et al.*, September Term, 1969, Miscellaneous No. 7540. The District Attorney thereupon presented to the October Grand Jury evidence against defendant. It has been stipulated that the evidence was the Fourth Presentment, which was read to the Grand Jury by a District Attorney's detective. The Grand Jury returned Bill No. 2420, charging defendant with conspiracy, and Bill No. 2421, charging him with false pretenses.

On January 12, 1970, the District Attorney presented to the January Grand Jury, and the Grand Jury returned, Bill No. 266, charging that defendant, Thomas Taylor, H. H. Robertson Company, McCormick-Taylor Associates, McCloskey Construction Company, and Paul Marzullo "did conspire to obtain money by false pretenses from the City by falsely representing to the said City [various matters with respect to the construction of the stadium]".

On April 22 The Honorable Vincent A. Carroll, President Judge, assigned to this Court "for all pretrial and post-trial motions and trial" the indictments against defendant (Bills Nos. 2420 and 2421 of the October, 1969, Term, and Bill No. 266

of the January, 1970, Term), along with the indictments against the other persons and companies accused by the Investigating Grand Jury in its Fourth Presentment of crimes incident to construction of the stadium. After conference with the Assistant District Attorney and defense counsel on all of the indictments thus assigned, the Court ordered: that all pre-trial motions either by the Commonwealth or by any defendant must be filed by June 1; that briefs in support of the motions must be filed by June 15; and that argument on the motions would be heard during the week of Junke 22. At a second conference, the order in which the motions should be argued was agreed upon by the Assistant District Attorney and counsel for defendants on all of the indictments, and the agreement was approved by the Court. In accordance with the agreement, argument was heard on June 22. At a second conference, the order in the motions thus argued was defendant's motion to quash the indictments.*

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* Defendant's motion is captioned only under Bill No. 266 of the January, 1970, Term. However, the motion is applicable also to Bills Nos. 2420 and 2421 of the October, 1969, Term. One of the motions filed with this Court was a motion by the Commonwealth asking that all of the indictments returned by the October Grand Jury against defendant and against Thomas Taylor, H. H. Robertson Company, McCormick-Taylor Associates, McCloskey Construction Company, and Paul Marzullo be consolidated for trial with the indictment against these persons and companies returned by the January Grand Jury. (The Commonwealth asked in the same motion that with these indictments there be consolidated an indictment returned by the October Grand Jury against Harry Blatstein.) In this motion the Commonwealth described Bill No. 266 "as a superseding indictment charging the same offenses as are described in [the indictments returned by the October Grand Jury.]"

DISCUSSION

a) *Preliminary statement of the issue*

Among the motions argued during the week that defendant's motion to quash the indictments was argued were motions filed by defendant and two other defendants, Thomas Taylor and Paul Marzullo, to suppress certain testimony. In an opinion filed as a companion to this opinion it has been held that these motions to suppress must be granted because when defendant, Taylor, and Marzullo were judically compelled to testify before the Investigating Grand Jury without being permitted to consult with counsel, their rights under the Fifth and Sixth Amendments of the United States Constitution were violated.

The Court does not know what the testimony was; the Assistant District Attorney has contended that the Court should not examine the transcript of the testimony, and as it has been possible to dispose of the motion before the Court without an examination of the transcript, the Court has acceded to the Assistant District Attorney's contention. It is evident, however, that the indictments against defendant are based at least in part upon his testimony to the Investigating Grand Jury. It has been stipulated that the only evidence presented to the October Grand Jury, when the District Attorney asked it to return indictments against defendant, was the Investigating Grand Jury's Fourth Presentment. From that Presentment it appears that the Investigating Grand Jury in arriving at its recommendation that defendant should be indicted considered the

testimony of defendant as well as of other witnesses;* in addition, it appears that the Commonwealth intends to use at trial the testimony that defendant, and also Taylor and Marzullo, gave to the Investigating Grand Jury. Accordingly, it is necessary to decide whether an indictment must be quashed when based at least in part upon testimony obtained in violation of a defendant's constitutional rights.

b) *The historical background*

Because the grand jury developed in England before the United States Constitution was adopted, the Federal courts, when required to interpret the Fifth Amendment's guarantee of a grand jury presentment or indictment in an infamous case, looked to English grand jury practice. *Costello v. United States*, 350 U.S. 359, 361-63 (1956).

In general it may be said that the English practice was to rely upon the trial rather than upon the grand jury proceedings to protect a defendant's rights. Thus, a motion to quash an indictment as based upon hearsay evidence, or incompetent evidence, or evidence insufficient to make out a *prima facie* case, would be dismissed. *See: Costello v. United States, supra*, at 363: *Holt v. United States*, 218 U.S. 245 (1910). To be sure, in a sense it was unjust to a defendant to indict him on the basis of such evidence. However, the injustice would be redressed at the trial. If the only evidence that the

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* Defendant's testimony is quoted, directly or by paraphrase, at pages 21, 22, and 23 of the fourth Presentment.

Crown had was hearsay, or incompetent, or insufficient to make out a *prima facie* case, the defendant would be acquitted.

This approach appears to have been the result of a balancing by the English courts of two factors: on the one hand, procedural speed, as opposed, on the other hand, to the protection of the defendant's rights. If an indictment could be challenged because based upon evidence that was hearsay, or incompetent, or insufficient to make out a *prima facie* case, the result would be that in many criminal prosecutions there would be two evidentiary proceedings: first the defendant would move against the indictment; and second, if the indictment were sustained, he would be tried. Evidently the conclusion of the English courts was that such a procedure was unnecessarily dilatory and cumbersome. *See* cases collected in *Commonwealth v. Dessus*, 423 Pa. 177, 224 A.2d 188 (1966). It was recognized that there were advantages in permitting the grand jury to decide whether to return an indictment unfettered by technical rules of evidence; and although this might sometimes result in unjust indictments, the advantages of such informal procedure were thought to overcome the disadvantage of such injustice since the injustice could be redressed at the trial.

c) *The impact of the United States Constitution on English practice*

As an initial proposition it might be supposed that grand jury practice in the United States should be the same as in England. Indeed, as will appear,

there is language in the cases that seems to say as much. It is evident, however, that such a proposition would depend upon an unstated conclusion. English practice developed in the absence of a written constitution; and to conclude that grand jury practice in the United States should be the same as in England would be to say that the United States Constitution should not affect United States practice. As a matter of logic, this is a *non sequitur*. The fact that the courts in England, where there is no constitution, have found a particular practice sufficient to protect a defendant's rights, does not prove that the courts in the United States, which are inhibited by a constitution that guarantees rights not guaranteed in England, must, or should, adopt the English practice. The point may be illustrated by asking a question: Should it be held, that no matter how rudely a grand jury treats the constitutional rights of a defendant, the indictment will not be quashed but the defendant left to assert his rights at trial?

The question is not new. For example, in *Costello v. United States*, 350 U.S. 359, 362 (1956), Mr. Justice Black used language so broad as to suggest that to comply with the Constitution it was necessary only to follow English grand jury practice. Mr. Justice Burton agreed with Mr. Justice Black's conclusion, that on the facts before the Court the motion to quash the indictment should be denied. He was unwilling, however, to join Mr. Justice Black's opinion because he was concerned that its language was too broad. Thus he said:

I agree with the denial of the motion to quash the indictment. In my view, however, this case does not justify the breadth of the declarations made by the Court. I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen.

. . . .

To sustain this indictment under the above circumstances is well enough, but I agree with Judge Learned Hand that "if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." 2 Cir. 221 F.2d 668, 677. Accordingly, I concur in this judgment, but do so for the reasons stated in the opinion of the Court of Appeals and subject to the limitations there expressed. See also, Notes, 62 Harv. L. Rev. 111; 65 Yale L. J. 390. (350 U.S. at 364-65.)

Thus, the question, what impact does the United States Constitution have on grand jury practice, remains open, or at least its answer uncertain. In deciding upon the answer in the present case, it

will be helpful to consider first the Federal cases and then the Pennsylvania cases.*

d) *The Federal cases*

The question, what is the impact of the Constitution on grand jury practice, was the subject of extended and searching discussion in *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964). In that case there were other questions, and the eleven Judges of the Court, who heard argument and re-argument en banc, divided in a complex way that need not be analyzed here. It is sufficient to note that Senior Circuit Judge Prettyman in his opinion opposing quashing the indictments before the Court spoke in terms so broad as to permit the interpretation that he would not quash an indictment no matter how rudely the grand jury violates a defendant's constitutional rights, and that Senior Circuit Judge Edgerton for reasons stated in his opinion concluded that none of the cases on which Judge Prettyman relied, nor any other case, went so far, and that at least under some circumstances an indictment should be quashed if based on evidence unconstitutionally obtained.**

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* For cases from other jurisdictions, *see* Annot., *Self-Incrimination Before Grand Jury*, 38 A.L.R. 2d 225 (1954), in particular, Section IV, Validity of Indictment; apart from immunity statutes, at 269 *et seq.*, and A.L.R. 2d Later Case Service 660-661 (1969).

** Chief Judge Bazelon and Judges Fahy and Wright concurred in Judge Edgerton's opinion. It is perhaps not clear but it would appear that Judges Washington and McGowan also concurred in Judge Edgerton's opinion, although they may have regarded it as unnecessary to decide the question. Judges Miller, Danaher, Bastian, and Burger (now Mr. Chief Justice Burger) concurred in Judge

The cases on which Judge Prettyman principally relied were: *Costello v. United States*, 350 U.S. 359 (1956); *Lawn v. United States*, 355 U.S. 339 (1958); *Holt v. United States*, 218 U.S. 245 (1910); and *United States v. Cleary*, 265 F.2d 459 (2d Cir. 1959), *cert. denied*, 360 U.S. 936 (1959). Examination of these cases has lead this Court to conclude that Judge Edgerton's analysis is persuasive, and that they do not hold that an indictment will not be quashed no matter what the constitutional violation but to the contrary clearly imply that at least under some circumstances of constitutional violation the indictment must be quashed.

In *Costello*, Mr. Justice Black, opened the opinion for the Court by stating:

> We granted certiorari in this case to consider a single question: " 'May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?' " 350 U.S. 819. (350 U.S. at 359.)

Prettyman's opinion. It should also be noted that the difference between Judge Prettyman and Judge Edgerton should not be overstated. The two judges looked at the record somewhat differently, and it is difficult to know to what extent this difference influenced their opinions. In particular, Judge Prettyman did not regard the record as showing that the defendant had been deprived of the assistance of counsel for his defense. (See, for example, 342 F.2d at 862). Nevertheless, it seems fair to say that Judge Edgerton and the Judges who concurred in his opinion understood that at least Judge Prettyman might be suggesting that an indictment would not be quashed no matter what the constitutional violation, although at least as this Court reads Judge Prettyman's opinion, it is not obvious that Judge Prettyman intended to say more than that on the record before him, the constitutional violation was not one that would warrant granting the motion to quash the indictment.

Thus it is clear that in *Costello* the Court did not consider the issue presented in the present case, *i.e.*, whether an indictment must be quashed when based at least in part upon evidence obtained in violation of a defendant's constitutional rights, but was considering a much narrower (or, if one prefers, broader) issue. Sometimes, to be sure, to admit hearsay evidence may violate a defendant's rights. Often, however, no violation of a constitutional right will be involved; and that was the case in *Costello.*

There it appeared that at the defendant's trial, which was on the charge that the defendant had "falsely and fraudulently reported less income than he and his wife had received during the taxable years in question" (350 U.S. at 360), "the Government called and examined 144 witnesses and introduced 368 exhibits" (*id.*). It also appeared, however, that the evidence against the defendant had been presented to the grand jury by only three government agents, who "had no firsthand knowledge of the transaction" (350 U.S. at 361) but had summarized the evidence and had introduced computations derived from the summary. Thus the defendant was correct in noting that the indictment against him was "based solely on hearsay evidence". (350 U.S. at 361.) The Court held, however, that that fact did not constitute a violation of

> that part of the Fifth Amendment providing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *" . . . . (350 U.S. at 261.)

This provision of the Fifth Amendment, said the Court, did not prescribe "the kind of evidence upon which grand juries must act." (350 U.S. at 362.) When the Fifth Amendment was adopted, the English grand jury could return an indictment upon hearsay evidence: and

> There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.
>
> * * * *
>
> An indictment returned by a legally constituted and unbiased grand jury [footnote omitted], like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more. (350 U.S. at 362, 363.)

It may be that the Supreme Court, if faced with a case such as the present case, where a defendant was required to testify before a grand jury in violation of his rights under the Fifth and Sixth Amendments, will hold that the violation is immaterial so far as a motion to quash the indictment is concerned; but to make such a prediction upon the basis of the Court's rather broad language in *Costello*, when that language is considered in light of the facts that were before the Court, appears unwarranted. Instead, this Court accepts and follows the following analysis by Judge Edgerton:

> In rejecting [defendant's] contention [in *Costello*] the Supreme Court used the broad language quoted above and immediately added "The

Fifth Amendment requires nothing more", *i.e.*, nothing more than an "indictment returned by a legally constituted and unbiased grand jury, ° ° ° if valid on its face". . . This means that the grand jury clause of the Fifth Amendment "requires nothing more". No other constitutional question was before the Court. We do not understand the Court's opinion to say anything about any other constitutional question. Due deference forbids us to interpret the opinion as containing a vast dictum to the effect that the entire Constitution, including all its Amendments, "requires nothing more"; in other words, that the proceedings of a legally constituted and unbiased grand jury may violate any number of the defendant's constitutional rights, including his right to the assistance of counsel and his privilege against self-incrimination, without affecting the validity of the indictment. *Costello*, therefore, is no bar to our view that an indictment obtained in violation of constitutional rights must be dismissed. On the contrary, *Costello* substantially supports this view. For the Supreme Court affirmed the conviction of *Costello* on the ground that the grand jury's action in indicting him had not violated his constitutional rights. The Court thereby implied that if the grand jury's action had violated his constitutional rights, the indictment would have been invalid and the conviction would have been reversed. (342 F.2d at 872.)

Nor does the Supreme Court's later decision in *Lawn*, also, as has been noted, relied upon by

Judge Prettyman, in any way disturb Judge Edgerton's analysis of *Costello*.

In *Lawn* the defendants were charged with evading assessment and payment of federal income taxes for the year 1946; the assertion was that they had concealed income derived from World War II black market operations. (355 U.S. at 342-43.) The investigation of the defendants had begun in 1948. (355 U.S. at 344.) In early July 1952, the defendants were subpoenaed to appear and testify before a grand jury, and on July 14, 1952, they did appear and testify, "but were not warned of their constitutional privilege against self-incrimination". (355 U.S. at 344-45.) On October 20, 1952, the grand jury returned indictments against the defendants. On the defendants' motions, the District Court dismissed the indictments and directed the Government to return to the defendants the records that the defendants had produced before the grand jury in response to the subpoenas. (355 U.S. at 345.)

The Government appealed, but the appeal was dismissed as untimely. (355 U.S. at 345.) While the appeal was pending, however,

> the Government caused a new investigation to be made of [the defendants'] federal income tax liabilities by another grand jury, before whom [the defendants] did not appear, and on July 23, 1953, that grand jury returned the present indictment which was sealed. After the Government's appeal from the order dismissing the 1952 indictment had been dismissed . . . the new sealed indictment was opened, and soon afterwards [the

> defendants] moved (1) to dismiss the indictment, and in that connection (2) to have a hearing to determine whether the Government had used testimony given or documents produced by [the defendants] before the 1952 grand jury, or evidence obtained through leads and clues furnished thereby . . . . (355 U.S. at 346.)

In opposition to the defendants' motions to dismiss the indictment

> the Government filed affidavits made by all of the revenue agents who had conducted investigations leading to the indictment and by all the United States Attorneys who had been responsible for the prosecution of the case. (355 U.S. at 346, n. 9.)

The affidavits showed that the indictment was not based in any way upon the testimony or documents obtained in the 1952 grand jury proceedings but instead was based only upon evidence obtained by the Government "long before 1952". (*Id.*)

The defendants' motions to dismiss the indictment were submitted to the District Court upon the defendants' and the Government's affidavits, and the Court found that there was

> no room for an inference that the Government had used illegally obtained materials in securing the present indictment

and that no further proceeding with respect to the motions was warranted. (355 U.S. at 346-47.)

After trial the defendants were found guilty as charged, and the Court of Appeals affirmed. (355 U.S. at 342.) On appeal to the Supreme Court one of the contentions by defendants was

> that they were deprived of due process in violation of the Fifth Amendment by the refusal of the District Court to conduct a full-dress hearing to determine whether testimony or documents obtained from them in [the 1952] grand jury investigation, or evidence derived from leads and clues furnished thereby, was considered by the grand jury that returned the present indictment. (355 U.S. at 344.)

As is evident from the statement of the case, this contention was close to frivolous, and the Supreme Court dismissed it almost curtly, stating:

> It should be unnecessary to say that we are not here dealing with the use of incompetent or illegal evidence in a trial on the merits, nor with the right to decline to give incriminatng testimony in legal proceedings or to suppress the direct or derivative use at the trial of evidence illegally obtained. We deal here only with the question whether [the defendants], in the circumstances of this case, were entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions that the 1953 grand jury that returned this indictment made direct or derivative use of the materials which they produced before the 1952 grand jury. We hold that they were not. (355 U.S. at 350.)

Thus, it would seem most difficult to read *Lawn* as supporting the conclusion that no indictment will be quashed, no matter what the constitutional violation upon which the indictment depends. Instead, the great care that Mr. Justice Whittaker expended in stating the case implies that had it appeared that the defendants' second indictment had been based at least in part upon evidence that had been obtained in violation of the defendants' constitutional rights, the Supreme Court would have considered whether the violation warranted quashing the indictment.

The remaining Federal cases to be considered, and which were relied upon by Judge Prettyman, need be stated only briefly.

In *Holt* Mr. Justice Holmes said:

> It is pressed with more earnestness that the court erred in not granting leave to withdraw the plea of not guilty, and to interpose a plea in abatement and motion to quash. The ground on which leave was asked was an affidavit of the prisoner's counsel that they had been informed by Captain Newton, of the Coast Artillery Corps, that he testified before the grand jury to admissions by the prisoner, but that these admissions were obtained under circumstances that made them incompetent. The affidavit added that, aside from the above testimony, there was very little evidence against the accused. Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in

case of such an inquiry, the discretion of the trial court is subject to review (*United States v. Rosenburgh*, 7 Wall. 580), it is enough to say that there is no reason for reviewing it here. All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground. *McGregor v. United States*, 69 C.C.A. 477, 134 Fed. 187, 192; *Radford v. United States*, 63 C.C.A. 491, 129 Fed. 49, 51; *Chadwick v. United States*, 72 C.C.A. 343, 141 Fed. 225, 235. (218 U.S. at 247-48.)

Strictly read, this would seem to be *dictum*, but however read, it is not pertinent to the question now being considered, for later in Mr. Justice Holmes' opinion it appears that the trial judge, after hearing, determined that in fact the defendant's admissions were not obtained under circumstances that made them incompetent. (218 U.S. at 250.)

As for *Cleary*, although it does contain a full discussion of the origin and nature of the grand jury, in the course of which some broad statements are made (265 F.2d at 460-61), nevertheless, in reversing the order of the District Court dismissing the defendant's indictment, the Court of Appeals only held that

we have no doubt that Cleary's testimony [before the grand jury] was completely voluntary [because he had been warned of his rights and had

> intelligently waived those rights] (265 F.2d at 462.)

and that

> [w]e do not see that the circumstances under which [the defendant's] indictment was procured reveal the slightest injustice to him or afford him any basis for believing that he will not receive a fair trial in due course. Hence the indictment must be reinstated. (265 F.2d at 463.)

e) *The Pennsylvania cases*

It will be convenient to consider the Pennsylvania cases under two headings: (i) *Commonwealth v. Dessus*, 423 Pa. 177, 224 A.2d 188 (1966), which is the strongest case in support of the Commonwealth's assertion that defendant's motions to quash the indictments should be denied; and (ii) *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A.2d 780 (1954), which is the strongest case in support of defendant's assertion that the motions should be granted.

(i) *Commonwealth v. Dessus*

In *Dessus* the defendant was indicted for murder; the indictment was returned on May 10, 1966, which was the same day the defendant was held for the grand jury. (423 Pa. at 179, 224 A.2d at 190.) On August 16, 1966, the defendant filed a motion to suppress a confession that he had given to a detective of the Philadelphia police force. After hearing, the lower court suppressed the confession on the

ground that the defendant had not been fully warned of his constittuional rights. Then, on September 28, 1966, the lower court ordered that the indictment be quashed because based on hearsay testimony. (423 Pa. at 180, 224 A.2d at 190.) On appeal, this was held error, although the lower court's order was affirmed on other grounds that were argued only to the Supreme Court. (423 Pa. at 186-89, 224 A.2d at 195.) The error was held to be both factual and legal.

The factual error was that the lower court "assumed that defendant's statement had been submitted by [the detective] to the Grand Jury", whereas "there was no evidence that [the] statement . . . was read by or shown by [the detective] to the Grand Jury. . . ." (423 Pa. at 180, 224 A.2d at 190.)

The Supreme Court, however, made it plain that its decision went beyond this factual error and was based upon legal error; it did not say in so many words that it would assume *arguendo* that the defendant's statement had been submitted to the grand jury, but its discussion, starting at 423 Pa. at 181, 224 A.2d at 191, unmistakably implies that *arguendo* it did make such an assumption, and that even so the lower court's order was error.

The reason it was error was that

> The law is well settled in Pennsylvania that an indictment can be found by a Grand Jury based upon hearsay testimony or upon evidence which was incompetent or inadequate to make out a

prima facie case. (423 Pa. at 181, 224 A.2d at 191.)

In support of this proposition the Court collected many Pennsylvania cases; it also cited Federal cases, including *Lawn* and *Holt*, and particularly *Costello*, which have been discussed earlier in this opinion. *Costello* was quoted extensively. (423 Pa. at 181, 182-85, 224 A.2d 191-92.)

It is clear from *Dessus* that the Court decided two propositions. The first proposition was that an indictment would not be quashed because based on hearsay. This proposition was not new, and, as the Court noted, had often been decided. The second proposition was that an indictment would not be quashed because based on hearsay, even if the hearsay depended upon a violation of the defendant's constitutional rights, specifically, his right under the Fifth Amendment not to incriminate himself. This proposition was new; and although the Court in deciding it relied upon *Costello*, *Lawn*, and *Holt*, it has been seen earlier in this opinion that in fact those cases did not involve situations where there had been a violation of a defendant's constitutional rights.

The question, therefore, is this: How far did the Court in *Dessus* intend to go? Did it intend to say that an indictment should not be quashed no matter what the constitutional violation? Or was the Court addressing itself only to the particular constitutional violation presented by the facts before it?

The Assistant District Attorney urges that *Dessus* should be read as saying that an indictment should

not be quashed no matter what the constitutional violation. If he is correct, defendant's motion to quash must be denied. It is clear, however, that he is not correct, as will appear, first from a consideration of *Kilgallen*, and next from a reconsideration of *Dessus*, in particular, of its statement of what *Kilgallen* holds.

(ii) *Commonwealth v. Kilgallen*

Kilgallen can be understood only against the background of the decisions that led up to it: *Manko Appeal*, 168 Pa. Super. 177, 77 A.2d 700 (1951); *Commonwealth v. Gross*, 172 Pa. Super. 85 92 A.2d 251 (1952); and the decision by the Superior Court that the Supreme Court in *Kilgallen* reversed; the Superior Court's decision is reported in 175 Pa. Super. 52, 103 A.2d 183 (1954).* The events that led up to these decisions were as follows:

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* This is not to say that there are no other Pennsylvania cases involving motions to quash indictments based upon a claim that a defendant's constitutional rights have been violated. These other cases do not, however, appear helpful, for, in contrast to the present case, no constitutional violation appeared. For example, in *Commonwealth v. Bolger*, 229 Pa. 597, 79 A. 113 (1911), the defendant moved that the indictment should be quashed because based upon testimony he had given to an investigating grand jury, which he said, was self-incriminating. However, after examining the record, the Court said: "So we say here the fair presumptions that flow from the record . . . point to the conclusion that this defendant was deprived of no constitutional right. It was his right to place upon the record, if he could, the facts which would properly raise the conclusion he now asks us to reach. We are satisfied he has not done this . . . ." (229 Pa. at 606, 79 A. at 116.) Similarly, in *Commonwealth v. Rhey*, 140 Pa. Super. 340, 345, 14 A.2d 192, 195 (1940), the Court said: "The record, here, shows that in each instance when a witness refused to answer before the grand jury on the ground of self-incrimination, he was taken before the court and was instructed as to his rights and those rights were respected."

On July 7, 1950, the Attorney General of Pennsylvania petitioned the Court of Quarter Sessions of Allegheny County to summon an investigating grand jury. (*See Margiotti Appeal*, 365 Pa. 330, 75 A.2d 435 (1950). The petition charged that Howard Gross, George Manko, and Thomas Kilgallen had defrauded the City of Pittsburgh. An investigating grand jury was summoned, and Gross, Manko, and Kilgallen were called as witnesses before it. Gross and Manko each declined to answer certain questions on the ground that the answers would incriminate him; for this, each was adjudged guilty of contempt and sentenced to a fine and imprisonment. When Kilgallen was called, he claimed constitutional immunity. The Court nevertheless directed him to testify before the investigating grand jury, which he did. As of the September Sessions, 1950, the investigating grand jury, without the testimony of Gross or Manko, but on the basis of the testimony of Kilgallen and of many other witnesses, returned a presentment recommending that Gross, Manko, and Kilgallen be indicted. The Attorney General thereupon presented indictments to an indicting grand jury, which returned them as true bills.

In *Manko Appeal* the fines and sentences imposed upon Gross and Manko for their refusal to testify before the investigating grand jury were set aside, the Court holding:

> Where one is charged with a specific crime or crimes in a petition for the calling of an investigating grand jury, such person is not merely a

witness. The only purpose of calling him as a witness is to obtain proof of the criminal charges, *i.e.* to have him give evidence against himself. He therefore cannot be compelled to testify before the grand jury if he claims his constitutional privilege . . . . To say that a person accused of a crime can be compelled to testify as a witness before an investigating grand jury merely because that jury can only *recommend* an indictment, is fallacious.

We are also of the opinion that answers to the questions asked each of the appellants might very well be incriminatory [footnote, quoting the questions, omitted]. While the witness, of course, is not the sole judge of whether the answers might be incriminating, yet each question must be viewed in the light of whether the answer *can* implicate the witness. (168 Pa. Super. at 180-81, 77 A.2d at 701-02; the Court's emphasis.)

There were two indictments returned by the indicting grand jury against Gross, Manko, and Kilgallen; one indictment was against Gross; the other was against Gross, Manko, and Kilgallen. The lower court granted motions to quash each indictment, and the Commonwealth appealed to the Superior Court. So far as Gross and Manko were concerned, the appeals were decided in *Gross;* the appeal from the order quashing the indictment against Kilgallen was decided in *Kilgallen.*

In *Gross* the Superior Court reversed the order of the lower court and reinstated the indictments.

Gross and Manko argued that the indictments had been properly quashed because when presented to the indicting grand jury for its consideration, the indictments contained a reference to the "Presentment [of the investigating grand jury] at No. 59 September Sessions 1950". The lower court had accepted this argument, saying that because of the reference to the presentment, the indicting grand jury "could easily have been influenced by the illegal invasion of the constitutional rights of these defendants . . . ." (172 Pa. Super. at 88, 92 A.2d at 253.) The Superior Court, in reversing, noted, however, that there had been no such illegal invasion; citing its decision in *Manko Appeal*, it said:

> There was an attempt to invade [Gross's and Manko's] constitutional rights but the invasion was staunchly repelled by this Court (172 Pa. Super. at 89-90, 92 A.2d at 253),

and that

> There is no evidence that testimony taken by the investigating grand jury was introduced or referred to before the indicting grand jury. Gross and Manko were not called before the indicting grand jury, and there is no evidence that it knew that they had refused to testify before the investigating grand jury (*id.* at 91, 92 A.2d at 254).

Thus, *Gross* is comparable to some of the Federal cases that have been considered earlier in this opinion. As in *Costello* and *Lawn*, the indictments

were not quashed; but the reasoning of the Court in reaching this conclusion implied that they would have been quashed, had the Court found a constitutional violation that warranted quashing them.

Additionally, it is essential to note that the decision in *Gross* is closer in point than the Federal cases that have been discussed, for it involved, as does the present case, an investigating grand jury. The difference between the present case and *Gross* is that in the present case the grand jury did, whereas in *Gross* it did not, indict the defendants at least in part on the basis of testimony unconstitutionally obtained from the defendants before the investigating grand jury.

It will be recalled that when Kilgallen was indicted he too moved that the indictment be quashed, the lower court granted the motion, and the Commonwealth appealed to the Superior Court.

The difference between Gross and Manko, on the one hand, and Kilgallen, on the other, was that Gross and Manko did not testify before the investigating grand jury, while Kilgallen did. If the view that has been just expressed with respect to the Superior Court's reasoning in *Gross* is correct, this difference should have been critical: In *Gross*, the constitutional rights of Gross and Manko had not been violated, because they were not required to testify; hence the indictments against them should not be quashed; however, in *Gross* the Court implied that had there been constitutional violation, the indictments would have been quashed; the constitutional rights of Kilgallen were violated, because

he was required to testify, hence the indictment against him should be quashed.

A majority of the Superior Court, however, Judge Woodside not participating in the consideration or decision of the case, nevertheless held that the indictment against Kilgallen should not be quashed. With deference, the reasoning of the majority is difficult to follow. *Gross* is cited (175 Pa. Super. at 60, 103 A.2d at 186) but as though it held only that the secrecy of a grand jury's proceedings should not be violated, the majority seeming to regard Kilgallen's motion to quash the indictment as an attempt to impeach the regularity of the grand jury's proceedings (*cf.* 175 Pa. Super. at 57-60, 103 A.2d at 185-86), although also expressing doubt whether Kilgallen's testimony before the investigating grand jury had incriminated him (175 Pa. Super. at 60, 103 A.2d at 186).

Judge Reno filed a dissent from this reasoning, in which he said:

> The averments clearly present the case of the defendant. He claimed privilege under Art. I, sec. 9 of the Constitution of Pennsylvania when called to testify before an investigating grand jury, but by authority of Art. 3, sec. 32 he was compelled to testify despite claim of privilege.
>
> Art. 3, sec. 32 of the Constitution provides: "Any person may be compelled to testify . . . against any person who may be charged with having committed the offense of bribery . . . *but such testimony shall not afterwards be used*

against him in any judicial proceeding, except for perjury . . ." . . . . If the compelled testimony were read to or made available to the grand jury as evidence against the defendant, it cannot be maintained that such action is not a violation of the Constitution . . . .

Whether or not there was other evidence presented to the grand jury does not alter the fact that the presenting of compelled testimony was a direct contravention of the constitutional prohibition. Whether or not the jurors were influenced by the presence of such prohibited testimony is immaterial, its presence denies the defendant a constitutionally guaranteed privilege . . . .

. . . . .

The cases that express a reluctance to inquire into the secrecy of the grand jury all provide that under some circumstances it may be proper to do so. Indictments have been quashed for reasons comparatively technical. No case has come so far as to say that the breach of a constitutional prohibition is not an injustice that the court has no power to correct . . . . *The Commonwealth is never prejudiced by a proceeding undertaken to assure protection of a fundamental right inhering in a citizen charged with a serious offense.* (175 Pa. Super. at 61-63, 103 A.2d at 187; Judge Reno's emphasis.)

Judge Reno did not cite *Gross;* this may have been because he was the author of the opinion in *Gross*. In any event, his dissent is consistent with

Gross as this Court has read *Gross, i.e.*, as implying that in some circumstances, specifically including those circumstances presented in Kilgallen, a violation of a defendant's constitutional rights will result in the indictment being quashed.

Recognizing "the importance of the legal question involved", the Superior Court certified its decision to the Supreme Court. (175 Pa. Super. at 60-61, 103 A.2d (paragraph not reported in Atlantic Reporter).) The Supreme Court, speaking by Mr. Justice Chidsey, Mr. Chief Justice Stern dissenting, and Mr. Justice Bell not participating in the consideration or decision of the case, reversed the order of the Superior Court and remitted the record to the lower court for reinstatement of the motion to quash the indictment, with a direction that Kilgallen be permitted to offer testimony in support of the motion. (379 Pa. at 330, 108 A.2d at 787.)

The Supreme Court's opinion is expressed with notable vigor. After concluding that Kilgallen should be allowed to prove that the indicting grand jury had had read to it parts of the testimony that he had been required to give to the investigating grand jury, the court said:

> In so holding we must not be considered as departing from a strong adherence to the rule that ordinarily, for the reasons set forth in the *Smart* case [368 Pa. 630, 84 A.2d 782 (1951)], grand jurors cannot be permitted to impeach indictments regularly returned by them. However, as recognized in that case, the impenetrability of grand jury proceedings is subject to

> exceptions and we think that the instant case presents a justifiable exception. If appellant's constitutional rights were ignored as contended, it was a flagrant transgression of the letter and spirit of our organic law. (379 Pa. at 330, 108 A.2d at 787.)

It is particularly to be noted that in reaching this conclusion, the Court quoted extensively from *Gross*, "refer[ring] [to it] at some length" (379 Pa. at 323, 108 A.2d at 784) and expressly noting the distinction, which has been stated above, between the facts in *Gross* and the facts in *Kilgallen*:

> There is a marked difference in the situation here presented. In the *Gross* case Manko and Gross did not testify before the investigating grand jury other than to give their names and addresses, and the indicting grand jury did not even know that they had appeared and refused to testify. Here it is averred in the motions to quash, and not denied by the Commonwealth, that Kilgallen at the direction of the court testified generally before the investigatory grand jury and that his testimony was made available to, considered and used by the indicting grand jury. (379 Pa. at 323-24, 108 A.2d at 784.)

In concluding that Kilgallen's averments supported his motion to quash the indictment the Court made alternative holdings.

First, the Court relied upon the fact that when Kilgallen "appeared before the grand jury, [and] testified at the Court's order and thus under judicial

compulsion" (379 Pa. at 324, 108 A.2d at 785), his right under Article I, §9, of the Pennsylvania Constitution not to incriminate himself was violated. Said the Court:

> It is true, as stated by the Superior Court in the *Gross* case, that ". . . Proof that a grand jury heard irrelevant testimony, *Com. v. Spallone,* 154 Pa. Superior Court 290, 35 A.2d 731; or hearsay evidence, *Com. v. Stones,* 70 Pa. Superior Ct. 365, affirmed 265 Pa. 139, 108 A. 624; or incompetent witnesses, *Com. v. Padden,* 160 Pa. Superior Ct. 269, 50 A.2d 722, will not invalidate an indictment where other proper evidence was adduced before it . . .". But we know of no case in this jurisdiction that denies the right to challenge the validity of an indictment on the ground of violation of the accused's constitutional rights here asserted—and so challenge successfully upon proper and sufficient proof. (379 Pa. at 325-26, 108 A.2d at 786.)

As the second ground of its holding, the Court followed the reasoning of Judge Reno's dissent in the Superior Court. Said the Court:

> Assuming arguendo that an indictment may be upheld despite the reception of criminating evidence in violation of the accused's rights under Article I, Section 9 of the Constitution if there is other evidence to support the indictment, here the appellant was charged with bribery . . . . (379 Pa. at 326, 108 A.2d at 785),

the Court going on to note, as had Judge Reno in the passage from his dissent that has been quoted above, that Article III, §32, of the Pennsylvania Constitution forbids the use of the testimony of a person compelled to testify "in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery", and that this provision was violated when Kilgallen's testimony was used before the grand jury that indicted him (379 Pa. at 326-28, 108 A.2d at 785).

1. *Has Kilgallen been substantially overruled by Dessus?*

The Assistant District Attorney has argued that *Kilgallen* and *Dessus* are so at odds that *Kilgallen* must be regarded as substantially overruled by *Dessus*. The argument is without merit.

In *Dessus* the lower court had relied upon *Kilgallen*. In noting that this reliance was error, the Supreme Court said:

> *Kilgallen* is clearly distinguishable. That case merely decided (1) that an indictment cannot be found or based *upon the judicially compelled testimony of the defendant* because it would violate Article I, §9, of the Pennsylvania Constiution, which provides that a person "cannot be compelled to give evidence against himself", and also the Fifth Amendment to the United States Constitution which provides: ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ." and (2) for these

reasons the indictment must be quashed. (423 Pa. at 182, 224 A.2d at 191; the Court's emphasis.)

This statement is precisely applicable to the present case. In *Dessus* there was no judicial compulsion; hence the motion to quash was denied. In *Kilgallen* there was judicial compulsion; hence the motion to quash was granted.* In the present case, there was judicial compulsion; hence the motion to quash the indictments against defendant must be granted, unless there is some significant distinction between *Kilgallen* and the present case.

Before considering the Assistant District Attorney's contention that there is a significant distinction between *Kilgallen* and the present case, one further point should be noted.

If anything, *Dessus* strengthened *Kilgallen*, rather than weakening it. Nothing said in *Kilgallen* can fairly be read as applying to any case except one in which there was judicial compulsion of a defendant. By noting in *Dessus*, therefore, that *Kilgallen* "merely" applied to a case of judicial compulsion, the Supreme Court did not narrow *Kilgallen* but simply stated it accurately. However, as has been observed above, in *Kilgallen* the Supreme Court based its holding on two grounds: the defendant's rights under Article I, §9, of the Pennsylvania Constitution; and his rights under Article III, §32, of the Pennsylvania Constitution. If the Supreme Court

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* Cf. Annot., *Self-Incrimination Before Grand Jury*, 38 A.L.R. 2d 225, 269-70, 295-96 (1954).

in *Dessus* was applicable only to a case involving Article III, §32. Such a statement would seem logically unsound; no reason is apparent why one constitutional right should be preferred to another; and in any event, the right guaranteed by Article III, §32, is a corollary of the right guaranteed by Article I, §9; the very fact of the illogic, however, would indicate a desire to overrule *Kilgallen sub silentio*. Instead of making any such statement, the Court in *Dessus* made it plain that the basis of *Kilgallen* was not Article III, §32, expressly stating that the basis was Article I, §9, of the Pennsylvania Constitution and the Fifth Amendment of the United States Constitution.

2. *Is Kilgallen distinguishable from the present case?*

The Assistant District Attorney contends that *Kilgallen* is to be distinguished from the present case because in *Kilgallen* the defendant was named in the petition for an investigating grand jury as a person suspected to have committed a crime, whereas in the present case the petition for an investigating grand jury did not name defendant. This factual difference does not rise to a legal distinction.* The reasoning of the Supreme Court in

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* The difference is in any event slight. In paragraph 3 of the petition asking that an investigating grand jury be summoned, the District Attorney activity . . . in the City of Philadelphia's urban renewal efforts . . . .". Pharagraph 4 of the petition defines "urban renewal" as "including, but not limited to, new construction . . . land use, capital improvenments . . . and the participation in . . . said activities by any and all persons, partnerships, corporations and associations."

Kilgallen in no way turned upon the fact that Kilgallen was named in the petition for an investigating grand jury. The essential fact so far as the Court's reasoning was concerned was that Kilgallen had been judicially compelled to testify. The fact that Kilgallen had been named in the petition was irrelevant to the finding of compulsion; it only precluded argument that when compelled, he was not entitled to assert his privilege not to incriminate himself.

f) *Conclusions to be drawn from the cases*

It may be helpful to summarize the conclusions that have been drawn from the foregoing review of the cases.

(i) This Court accepts and follows the analysis of the Federal cases by Judge Edgerton in *Jones, that* an indictment must be quashed upon a showing of sufficient violation of a defendant's constitutional rights.

(ii) The decision of the Pennsylvania Superior Court in *Gross* implies, and the decision of the

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One of defendants, Thomas Taylor, testified to this Court that when he was called to testify before the Investigating Grand Jury, he was told that it was investigating the stadium (N.T. 5), and it may be assumed that the same was said to the other defendants.

If the petition asking that an investigating grand jury be summoned had said in so many words that the jury suspected "widespread criminal activity" with respect to the construction of the stadium, there would be substantially no distinction between *Kilgallen* and the present case; if a district attorney alleges corruption in the construction of a stadium, and then summons those responsible for the construction, it may be assumed that the district attorney is investigating those he has summoned.

Pennsylvania Supreme Court in *Kilgallen* holds, that the showing of violation is sufficient, and the indictment must be quashed, when the showing is that a defendant's rights under the Fifth Amendment of the United States Constitution and Article I, §9, of the Pennsylvania Constitution have been violated in that the defendant has been judically compelled to incriminate himself by testtifying before an investigating grand jury.

(iii) This conclusion is not inconsistent with sound grand jury practice but represents a proper accommodation between the desirability of prompt procedure and the need to protect a defendant's constitutional rights. Upon occasion there will have to be a hearing in addition to such hearings as may occur incident to trial. The occasion, however, will be rare, and its propriety and necessity have been recognized in *Kilgallen* ("If appellant's constitutional rights were ignored as contended, it was a flagrant transgression of the letter and spirit of our organic law") and reaffirmed in *Dessus.*

(iv) There is no such difference in the present case as would warrant this Court in not following *Gross* and *Kilgallen.*

g) *Remedy*

In *Kilgallen* the Supreme Court remanded for a hearing to determine whether the indicting grand jury had acted at least in part upon the basis of evidence obtained in violation of the defendant's

constitutional rights.* In the present case the necessary hearing has been held, and the motion to quash will be granted without further proceedings. By stipulation it is known what the evidence was that was presented to the indicting grand jury; it was the Investigating Grand Jury's Fourth Presentment; it is therefore further known that the indicting grand jury did act at least in part upon the basis of evidence obtained in violation of defendant's constitutional rights when defendant was judicially compelled to testify before the Investigating Grand Jury;** under *Kilgallen* no more is required to sustain the motion.

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* In referring to some cases from other jurisdictions it has been said that "the court's refusal to invalidate an indictment on the ground that the accused testified before the grand jury which indicted him has been made to turn, at least in part, on the court's conclusion that no incriminating evidence appeared in the accused's testimony." Annot., *Self-Incrimination Before Grand Jury*, 38 A.L.R. 2d 225 (1954) at 282. Here, however, it appears from the Fourth Presentment that, at least in the opinion of the Investigating Grand Jury, defendant did give incriminating testimony; moreover the Commonwealth is evidently determined to be able to use defendant's testimony to the Investigating Grand Jury at trial. It is not necessary to consider what other evidence against defendant the indicting grand jury considered. In the investigation in which Gross, Manko, and Kilgallen were involved, "a hundred other witnesses testified to the investigating grand jury (172 Pa. Super. at 89, 92 A.2d at 253); in holding that Kilgallen's motion to quash would lie, the Supreme Court did not require any averment that Kilgallen's testimony had had any particular significance as compared to the testimony of these other witnesses but only the averment that "the testimony of [Kilgallen] before the investigatory grand jury was made available and parts thereof read to the indicting grand jury . . ." (379 Pa. at 329, 108 A.2d at 787).

** Defendant's testimony is quoted, directly or by paraphrase, at pages 21, 22, and 23, of the Fourth Presentment.

ORDER

AND NOW, July 27, 1970, the Motion by defendant James McCloskey, to quash Bills Nos. 2420 and 2421 of the October, 1969, Term, and Bill No. 266 of the January, 1970, Terms, is granted.
Filed: July 27, 1970

B. Opinion and Judgment of Superior Court of Pennsylvania

OPINION Per Curiam, September 25, 1970: The six judges who heard this appeal being equally divided, the order of the court below is affirmed.

HOFFMAN, J., absent.

C. Opinion and Judgment of Supreme Court of Pennsylvania

Commonwealth, Appellant, *v.* McCloskey.

Appeal, No. 157, Jan. T., 1971, from order of Superior Court, Oct. T., 1970, Nos. 1377 to 1384, inclusive, affirming order of Court of Common Pleas, Criminal Division, of Philadelphia, Nos. 2416 to 2421, inclusive, Oct. T., 1969, 266, Jan. T., 1970, 2674 to 2679, inclusive, Oct. T. 1969, 2723 and 2724, Oct. T., 1969 and 879 to 897, inclusive, Sept. T., 1969. Orders of Superior Court versed in part and affirmed in part; reargument refused June 14, 1971.

Opinion by Mr. Justice Roberts, May 13, 1971:

The Commonwealth here appeals from decisions by an evenly divided Superior Court [1] affirming various orders of the Philadelphia Court of Common Pleas quashing indictments against and suppressing evidence Obtained from the several defendants. This complex appeal involves numerous issues, all of which center on two problems: (1) whether a criminal proceeding can lawfully be commenced by

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[1] *Commonwealth v. Blatstein*, 217 Pa. Superior Ct. 788, 269 A. 2d 151 (1970); *Commonwealth v. H. H. Robertson Company*, 217 Pa. Superior Ct. 789, 269 A. 2d 367 (1970); *Commonwealth v. McCloskey*, 217 Pa. Superior Ct. 789, 269 A. 2d 151 (1970); *Commonwealth v. McCloskey Construction Company*, 217 Pa. Superior Ct. 790, 269 A. 2d 367 (1970); *Commonwealth v. McCormick Taylor Associates*, 217 Pa. Superior Ct. 790, 269 A. 2d 152 (1970); *Commonwealth v. Marzullo*, 217 Pa. Superior Ct. 791, 269 A. 2d 152 (1970); *Commonwealth v. Steinberg*, 217 Pa. Superior Ct. 791, 269 A. 2d 146 (1970); *Commonwealth v. Taylor* 217 Pa. Superior Ct. 792, 269 A. 2d 146 (1970).

an investigating grand jury's presentment to an indicting grand jury without affording defendant an opportunity for a preliminary hearing; and (2) whether, or to what degree, a subpoenaed witness and potential defendant before an investigating grand jury is entitled to the assistance of counsel to aid him in asserting his right against self incrimination guaranteed both by the Fifth Amendment, applied to the states through the Fourteenth Amendment, and Article I, Section 9 of the Pennsylvania Constitution.

As to the former issue, we believe that an indictment based upon an investigating grand jury's presentment directly to an indicting grand jury with leave of court is lawful, even though no preliminary hearing was held. Concerning the assistance of counsel and the right against self incrimination, while we do not today hold that a witness is entitled to have counsel present in the hearing room or that he is entitled to step outside the door and consult with counsel after every question, we do believe that a witness should receive a warning by the court in charge of the investigating grand jury that if the witness is confused or believes his answer might be incriminating, he may come before the court accompanied by counsel and be advised of his rights. This procedure was not followed with reference to certain of the individual appellees now before us. Accordingly, those indictments in any way based upon a defendant's own testimony given without this warning and in violation of his right against self incrimination must be quashed.

I. BACKGROUND

The investigating grand jury of April Term, 1969, was convened by court order pursuant to a petition submitted by the Philadelphia District Attorney alleging various offenses were being or had been committed with respect to housing, urban renewal and public construction.

a. Frank M. Steinberg

After hearing numerous witnesses and receiving voluminous evidence, the investigating grand jury returned a presentment [2] on August 18, 1969, requesting that appellee, Frank M. Steinberg, a former Chairman of the Philadelphia Housing Authority, be indicted on several counts.

The court in charge of the investigating grand jury (SLOANE, J.) accepted the presentment, and the district attorney with leave of court then submitted the recommendations to the September indicting grand jury, which returned true bills against appellee Steinberg charging him with malfeasance, misfeasance and nonfeasance in office; conspiracy; deposit of public money for gains; violation of the State Adverse Interest Act; practice of corrupt solicitation; and corrupt solicitation.[3] All these indictments were returned without any complaint having been issued or any preliminary arraignment or preliminary hearing having been held.

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[2] The "second" presentment.

[3] The charges were embodied in Bills Nos. 879-90, 892-97.

Appellee filed several pre-trial motions challenging his indictments, all of which were argued during the week of June 22, 1970, when similar motions by the other appellees in this case were also being heard. Steinberg's motion to quash was granted on the basis that he had been deprived of his right to a preliminary hearing, and hence his motions for suppression of evidence, pre-trial discovery and severance were dismissed as moot by the court (SPAETH, J.). The Commonwealth appealed from the granting of the motion, and the Superior Court affirmed by an evenly divided court.[4]

b. The Stadium Cases

The same April, 1969, investigating grand jury returned a separate presentment[5] on September 4, 1969, recommending indictments against the other appellees on various charges relating to the construction of an all purpose municipal sports stadium in Philadelphia costing approximately $50,000,000. The court (SLOANE, J.) accepted the presentment.

Defendant Thomas Taylor, the district manager of H. H. Robertson Company, the steel subcontractors for the stadium, petitioned the court in charge of the investigating grand jury to grant him a preliminary hearing. His petition was denied, and his appeal to the Superior Court was quashed.

Then, on October 1, 1969, defendant H. H. Robertson Company itself filed a petition before the

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[4] See note 1, supra.

[5] The "fourth" presentment.

court in charge of the October, 1969, indicting grand jury (SPAETH, J.) seeking to restrain the district attorney from presenting the investigating grand jury's recommendations to the indicting grand jury until a preliminary hearing had been held, or else until certain conditions had been imposed on the manner in which the evidence was to be presented to the indicting grand jury. Defendants McCloskey and Company, Inc., the general contractor for the stadium, and James C. McCloskey, the firm's executive vice president, filed similar petitions on October 3, 1969, and defendants Paul Marzullo, Director of Architecture and Engineering for Philadelphia, and Harry Blatstein, the stadium coordinator, did likewise on October 6, 1969.

On October 24, 1969, Judge SPAETH entered an order dismissing defendants' petitions, setting forth his reasons for his action in an opinion, *In re Petition of H. H. Robertson Company*, September Term, 1969, Miscellaneous No. 7540. The district attorney then presented evidence [6] against the stadium defendants to the October indicting grand jury, which returned the following bills: charges of false pretenses and conspiracy against James C. McCloskey; charges of false pretenses and conspiracy against McCloskey and Company, Inc.; [7] charges of conspiracy against McCormick-Taylor Associates, engineering consultants to the stadium

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[6] It has been stipulated that this evidence consisted of the "fourth" presentment.

[7] Although the indictment was against "McCloskey Construction Company", we will refer to this defendant by its proper name, "McCloskey & Company, Inc."

architect; charges of conspiracy against Thomas Taylor; charges of bribery of government offices and employees, bribery of servants and employees, extortion, and malfeasance, misfeasance and nonfeasance in office against Harry Blatstein; charges of malfeasance, misfeasance, and nonfeasance in office and conspiracy against Paul J. Marzull; and charges of conspiracy against H. H. Robertson.[8] The district attorney also submitted a consolidated bill based on the same September presentment to the January, 1970, indicting grand jury, which returned a true bill [9] charging Thomas Taylor, H. H. Robertson Company, McCormick-Taylor Associates, McClosky & Company, Inc., James McCloskey and Paul Marzullo with conspiracy to obtain money by false pretenses from the City of Philadelphia. None of the above indictments were preceded by either a complaint, preliminary arraignment, or preliminary hearing.

The President Judge of the Philadelphia Court of Common Pleas [10] assigned all the foregoing cases to Judge SPAETH "for all pre-trial and post-trial motions and trial." Various pre-trial motions requesting, inter alia, the suppression of evidence, the quashing of indictments, and severance were filed, and arguments were heard during the week of June 22, 1970.[11]

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[8] All these charges were embodied in Bills Nos. 2416-21, 2674-78, and 2723-24.

[9] Bill No. 266.

[10] The late Hon. Vincent A. Carroll.

[11] The following pre-trial motions were filed:

"1. *Notions to suppress testimony*

On July 27, 1970, in a departure from his October 24, 1969, decision, Judge SPAETH filed four opinions granting the motions to quash and to suppress testimony of certain defendants. As to all the stadium defendants, Judge SPAETH concluded that in

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Filed by:
Paul Marzullo
James McCloskey
Thomas Taylor

"2. *Motion to quash indictments as based on unconstitutionally obtained testimony*
Filed by:
James McCloskey

"3. *Motions to quash indictments as defective for denial of a preliminary hearing*
Filed by:
Harry Biatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates
H. H. Robertson Company
Thomas Taylor

"4. *Motions for change of venue* (withdrawn during argument)
Filed by:
Paul Marzullo
McCormick-Taylor Associates
Thomas Taylor

"5. *Motions for continuance until the investigating Grand Jury is discharged*
Filed by:
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company
Thomas Taylor

"6. *Motions for continuance until the completion of the stadium*
Filed by:
Paul Marzullo
H. H. Robertson Company
Thomas Taylor

light of the intervening decision of this court in *Commonwealth v. Rose* and *Commonwealth ex rel. Magaziner v. Sheriff*, 437 Pa. 30, 261 A. 2d 586 (1970), the Pennsylvania Rules of Criminal Procedure now required a preliminary hearing in every criminal case. He therefore determined that the teaching of the recent decision of the United States Supreme Court in *Coleman v. Alabama*, 399 U.S.

"7. *Motions for discovery and for production of scientific reports*
Filed by:
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates

"8. *Motions for bill of particulars*
Filed by:
Harry Blatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
Thomas Taylor

"9. *Motion for consolidation of all bills*
Filed by:
Commonwealth of Pennsylvania

"10. *Motions for severance*
Filed by:
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company
Thomas Taylor

"11. *Motions in re order of proof*
Filed by:
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company

"12. *Motions to quash superseded indictments*
Filed by:
McCloskey & Company, Inc.
James McCloskey
McCormick-Taylor Associates
Thomas Taylor

1, 90 S. Ct. 1999 (1970) as well as considerations of equal protection and the defendants' right to counsel necessitated the indictments be quashed.

In a separate opinion dealing with defendant James McCloskey's petition to quash, Judge SPAETH ruled invalid an indictment based in part on testimony obtained in violation of a defendant's rights under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. In another separate opinion, Judge SPAETH directed that the testimony of defendants James McCloskey, Paul Marzullo and Thomas Taylor before the April, 1969, investigating grand jury be supressed because their Sixth Amendment right to effective assistance of counsel at a critical stage had been denied. Finally, as noted above,[12] Judge SPAETH quashed the indictment with respect to Frank Steinberg.

The Commonwealth appealed these decisions to the Superior Court which affirmed them all with-

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"13. *Motions for inspection of grand jury notes of testimony*
Filed by:
Harry Blatstein
Paul Marzullo
McCloskey & Company, Inc.
James McCloskey
H. H. Robertson Company
Thomas Taylor

"14. *Application for a blue ribbon jury*
Filed by:
Thomas Taylor"

[12] See pp. 2-3, supra. The Steinberg indictment was not involved in Judge Spaeth's October, 1969, opinion. There was accordingly no change with respect to this appellee.

out opinion by an equally divided court on September 25, 1970.[13] This consolidated appeal followed.[14]

II. NECESSITY OF A PRELIMINARY HEARING

a. Rules of Criminal Procedure

Appellees urge that their indictments are invalid because they violate the Pennsylvania Rules of Criminal Procedure which, in their view, establish a comprehensive procedure for the institution of all criminal prosecutions.

Rule 102 provides that "[e]xcept as otherwise provided in these rules, all proceedings shall be initiated by a written complaint, sworn to or affirmed,

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[13] See note 1, supra.

[14] Meanwhile, the Commonwealth proceeded against defendants McCloskey and Company, Inc., McCormick-Taylor Associates, H. H. Robertson Company, Paul Marzullo and James C. McCloskey by way of complaint, preliminary arraignment and preliminary hearing. Complaints were presented to the Muncipal Court (Dandbridge, J.) A dispute arose as to whether the preliminary hearing should proceed before Judge Dandbridge, as the district attorney desired, or before Judge Spaeth, as ordered by the late Hon. Vincent A. Carroll. Defendants petitioned this Court for a writ of prohibition and on September 15, 1970, we issued a rule calling upon Judge Dandbridge and President Judge Joseph R. Glancey of the Municipal Court of Philadelphia to show cause why the writ should not be granted. The rule issued without prejudice to preliminary hearings held in the meantime. On September 23, 1970, we granted defendants' petition for a writ of prohibition and the complaints were then transferred to Judge Spaeth for disposition. On September 28, 1970, a pre-hearing conference was held. Upon motion of the district attorney and over defendants' objections, the court on November 30, 1970, continued the preliminary hearing, explaining in an accompanying opinion that it did not wish to take any action which might interfere with this Court's disposition of this appeal.

and subscribed by affiant." [15] Rule 116 requires that a preliminary arraignment be held without "unnecessary delay" after an arrest, at which time the accused is entitled to a warning of his right to counsel and to bail, if he is accused of a bailable offense, as well as to his "right to have a preliminary hearing, or, except as provided in these rules, to waive it." [16] Rules 117 to 119 respectively deal with the nature and place of a preliminary hearing, the publicity and recording of the hearing, and the rights of parties at a preliminary hearing.

The issue, simply stated, is whether these Rules of Criminal Procedure have abrogated the power of a prosecuting official to submit an investigating grand jury presentment directly, with leave of court, to an indicting grand jury, a power which was a traditional and established exception to the normal procedure of instituting criminal proceedings by criminal complaint and preliminary hearing.[17]

As noted above, Rule 102 provided that all proceedings should be initiated by criminal complaint "[e]xcept as otherwise provided in these rules . . ." The Commonwealth submits that Rule 212(c)'s definition of "presentment" as ". . . a formal accusation made by a grand jury, drafted by the Commonwealth's attorney with leave of court and sub-

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[15] Rule 102 was subsequently amended effective May 1, 1970, to provide that a complaint is only one of several permissible methods of instituting criminal proceedings. However, the present appeal is governed by the former rules.

[16] Rules 116, 117, 118, and 119 have likewise been revised.

[17] See pp. 130-131, infra.

mitted for action to a subsequent indicting grand jury," is such an exception to Rule 102.

In his October, 1969, opinion Judge SPAETH accepted the Commonwealth's view of the Rules. The principal reason for altering his view on this issue in the July, 1970, determination, was his reading of the opinion of this Court in *Commonwealth v. Rose* and *Commonwealth ex rel. Magaziner v. Sheriff*, supra.

Initially we note that while Judge SPAETH may have been understandably misled by *Rose* and *Magaziner*, that decision is not determinative of the issue now before us. *Rose* and *Magaziner* involved situations where a trial judge in one case, and a habeas corpus hearing judge in the other sat as committing magistrates and summarily held defendants on charges of perjury, with no complaint having been issued or preliminary hearing having been held. No such situation is now before us.

No challenge to a grand jury presentment or the powers of a special investigating grand jury existed in *Rose* and *Magaziner*. Furthermore, the opinion's language concerning the Rules of Criminal Procedure stressed that the Rules applied to common pleas judges sitting as committing magistrates. The opinion was limited to that factual situation. This Court in no way there settled the question of whether the criminal rules pertaining to complaint and preliminary hearing superseded the other historical methods of commencing criminal prescutions.

While the Rules are silent on special grand jury functions, we agree with the Commonwealth that Rule 212(c) provides a sufficient exception to Rule 102 to permit the interpretation we enunciate today.

Moreover, even in the absence of Rule 212(c), we would not infer that such silence was intended to abolish the traditionally sanctioned procedure by which a court-supervised investigating grand jury makes its presentment. It would be unreasonable to infer such a drastic alteration, as urged by appellees, from mere silence in rules dealing with more commonplace criminal proceedings. The Rules of Criminal Procedure at present simply do not concern themselves with this long established practice, nor do they foreclose any of the other traditional exceptions [18] to proceeding by a preliminary hearing.

b. Constitutionality of an Investigating Grand Jury Presentment

Several of the appellees here advance the argument that to deny them a preliminary hearing in contradistinction to defendants whose prosecutions began with complaints is an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. A review and analysis of the traditional and historic methods for instituting criminal proceedings in this Commonwealth discloses that this contention is without merit.

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[18] See pp. 130-131, infra.

In the overwhelming majority of cases a criminal action commences with the appropriate prosecuting officials' filing of a complaint.[19] Preliminary arraignment and a preliminary hearing [20] follow. This procedure, which can certainly be viewed as the norm, admitted of exceptions in three general situations.

The first is where the district attorney or attorney general submits a bill to a grand jury without previous binding over or commitment of the accused. Such an exercise of official authority would be justified, for example, when the accused has fled or is about to flee the jurisdiction, and great haste is necessary. "The procedure in such cases, however, is under supervision of the court, and if the process and power is misapplied the court will vindicate itself in restraining its exercise." *Commonwealth v. Green*, 126 Pa. 531, 537, 17 Atl. 878, 879, (1889). Accord, *McNair's Petition*, 324 Pa. 48, 59-60, 187 Atl. 498, 503-04 (1936) and cases cited therein. See also, *Commonwealth v. Coyle*, 415 Pa. 379, 396, 203 A. 2d 782, 790-91 (1964).

The second exception is when an indicting grand jury makes a presentment based on personal knowl-

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[19] See generally, Address by the Hon. John C. Bell, District Attorney of Philadelphia, "The Several Modes of Instituting Criminal Proceedings in Pennsylvania," 13 Pa. Dist. Repts. 815 (1904).

[20] It is interesting to note that preliminary hearings were unknown at early common law. They were created by statute and originated not as a means of protecting persons arrested for crime but rather as an instrument to restrict their indiscriminate release. For a thorough history of the development of preliminary hearings in both England and this Commonwealth, see *Commonwealth v. O'Brien*, 181 Pa. Superior Ct. 382, 387-97, 124 A. 2d 666, 669-73 (1956).

edge of the juror without any bill of indictment having been laid before them. See *McNair's Petition*, supra, at 60, 187 Atl. at 504; *Commonwealth v. Green*, supra, at 537-38, 17 Atl. at 879. See generally 4 Wharton, Criminal Law and Procedure §1710 (1957).

We are here concerned with the final exception—a prosecutor's submission of an investigating grand jury presentment to an indicting grand jury with leave of court. Appellees contend the recent decision of the United States Supreme Court in *Coleman v. Alabama*, supra, while not requiring a preliminary hearing as a matter of constitutional law, holds that if a preliminary hearing is granted it becomes a critical stage in the proceedings, and the accused is accordingly entitled to the assistance of counsel. They further assert that because *Coleman* emphasizes the critical nature of the preliminary hearing, a procedure whereby some criminal prosecutions are initiated by hearing and others by investigating grand jury presentments raises a serious question of equal protection, for in effect two types of defendants have been created: those entitled to a preliminary hearing and those not entitled to such a proceeding. Appellees urge that such a classification is unreasonable and arbitrary because it permits a district attorney to create a classification at will, uninhibited by guidelines or restrictions.

We do not agree that these alternative modes of instituting criminal proceedings as they exist in this Commonwealth constitute an unreasonable classification. This Court has elsewhere summarized the origins of a grand jury's investigative powers, which

has been recognized in this Commonwealth since 1791.[21] It suffices to recall that while in some states a grand jury's inquisatorial capacity is virtually unlimited,[22] in Pennsylvania the freedom of the grand

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[21] See generally, *Hamilton's Appeal*, 407 Pa. 366, 383-86, 180 A. 2d 782, 790-91 (1962) (dissenting opinion); *McNair's Petition*, 324 Pa. 48, 56 n. 1, 187 Atl. 498, 502 n. 1 (1936).

Although the origins of the grand jury continue to be obscure, compare *McNair's Petition*, supra (Norman or Anglo-Saxon) with Whyte, Is the Grand Jury Necessary, 45 Va. L. Rev. 461, 462-63 (1959) (Greco-Roman or Scandinavian); there is general agreement that the institution first became formalized in England in 1162 by the Assize of Clarendon. See generally, Edwards, The Grand Jury 1-44 (1960); Plucknett, A Concise History of the Common Law, 16-19, 86-88, 102-21 (3d ed. 1940); 1 Pollock & Maitland, The History of the English Law 136-53, 598662 (2d ed. 1903); Stephen, A History of the Criminal Law of England 184-86, 250-58 (1883).

The assize was a body of laymen who were to report persons accused of robbery and other crimes to the royal sheriff. Their deliberations were open, and their purpose was to further the interest of the crown.

Then, in the seventeenth century, the grand jury became a protector of the individual against the crown. The single most significant manifestation of this change was the Earl of Shaftesbury's Trial, 8 How. St. Tr. 759 (1681) where the jurors requested and were permitted to question the witnesses in private. They then refused to indict. See 8 Wigmore on Evidence, §2360 (1961); see generally Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 456-58 (1965). The function of protecting the individual from indiscriminate prosecution remains the foremost duty of the grand jury today.

The origins of the grand jury's investigative powers are equally uncertain. See Dession and Cohen, The Inquisatorial Functions of Grand Juries, 41 Yale L.J. 687 (1932); Segal, Spivack and Costilo, Obtaining a Grand Jury Investigation in Pennsylvania, 35 Temp. L.Q. 73, 75 (1961). Yet, its inquisatorial powers were clearly established in this Commonwealth by 1791. See *McNair's Petition*, supra at 57, 187 Atl. at 503.

[22] See *McNair's Petition*, supra at 57-58, 187 Atl. at 503. See generally Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play? 55 Col. L. Rev. 1103 (1955); Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961); Note, Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury, 111 U. Pa. L. Rev. 954 (1963).

jury to investigate has been severely restricted. Hence we believe any fears of arbitrary action by district attorneys in this area are not supported by either the decisional law or the requisite procedure.

One of the earliest and most comprehensive discussions of a grand jury was *Lloyd & Carpenter's Case*, 5 Pa. L.J. 55, 3 Clark 188 (Ct. of Qtr. Sess. of Phila. 1845), cited with approval by this Court on many occasions.[23] After commenting on the other two extraordinary modes of procedure,[24] Judge KING there observed that an investigating grand jury is justified where criminal courts direct the investigation of: ". . . matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the courts on such occasions, rather bear on things than persons; the object being the suppression of general and public evils, affecting in their influence and operation communities rather than individuals and therefore, more properly the subject of general than special complaint. Such as great riots that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances affecting the public health and comfort; multiplied and flagrant vices tending to debauch and corrupt the public morals, and the like. In such cases the courts may properly, in aid of inquiries by them, summon, swear, and send before the grand

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[23] See, e.g., *Special Grand Jury Case*, 397 Pa. 254, 256, 154 A. 2d 592, 594 (1959); *McNair's Petition*, supra at 58, 187 Atl. at 503.

[24] See discussion, supra, pp. 130-131.

jury, such witnesses a they may deem necessary to a full investigation of the evils intimated, in order to enable the grand jury to present the offence and the offenders. But this course is never adopted in case of ordinary crimes, charged against individuals. Because it would involve, to a certain extent, the expression of opinion by anticipation, on facts subsequently to come before the courts for direct judgment; and because such cases present none of those urgent necessities which authorize a departure from the ordinary course of justice. In directing any of these investigations, *the court* act [sic] under their official responsibilities and must answer for any step taken, not justified by the proper exercise of a sound judicial discretion." Id. at 58-59, 3 Clark at 192 (emphasis added).

We have stressed with regard to a grand jury's investigative function that ". . . '. . . this power, which is a most delicate one, is never exercised unless under urgent necessity or . . . [where] the public would suffer from delays incident to ordinary forms of law.'" *McNair's Petition*, supra at 60, 187 Atl. at 504 (brackets in original) (citations omitted). Such concerns were the prime motivation underlying the historic requirement in Pennsylvania that *a court* be placed in charge of a special investigating grand jury to regulate the scope of inquiry, by, for example, administering the oath to the witnesses and receiving objections.[25]

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[25] The foreman of an investigating grand jury does not have the power to administer the oath. See *Commonwealth v. Hubbs*, 137 Pa. Superior Ct. 229, 8 A. 2d 611 (1939).

A court will first scrutinize the prosecuting official's petition for summoning the jury. See, e.g., *In re Grand Jury Investigation of Registration Commission*, etc., 22 Pa. D. & C. 2d 285 (1960); *District Attorney's Petition*, 50 Pa. C.C. 347 (1921); *In re Alleged Extortion Cases*, 29 Pa. C.C. 538 (1904).

The court's decision to proceed with, as well as its overseeing of the investigation is subject to the review of this Court through the recognized procedure of applying for a writ of prohibition to prevent an alleged improper exercise of power or an abuse of discretion by the supervising court. See *Hamilton Appeal*, 407 Pa. 366, 180 A. 2d 782 (1962). We have not hesitated to issue a writ of prohibition in cases where evidence did not indicate a special grand jury was necessary. Compare *Philadelphia County Grand Jury Investigation Case*, 347 Pa. 316, 32 A. 2d 199 (1943) (writ of prohibition issued) and *McNair's Petition*, supra (writ of prohibition issued) with *Dauphin County Grand Jury Investigation* (*No.* 1), 332 Pa. 289, 2 A.2d 783 (1938) (invetigation approved) and *Shenkar v. Harr*, 332 Pa. 382, 2 A. 2d 298 (1938) (investigation approved). See generally *Hamilton Appeal*, supra at 376-81, 180 A. 2d at 787-89 (1962) (appendix attached to concurring opinion listing Pennsylvania grand jury cases).

Moreover, we note that a writ of prohibition is not the only method by which our Court will review the propriety of the convening and functioning of an investigating grand jury. A convicted defendant who believes he has been aggrieved by

any illegal actions of the investigating grand jury could obtain appropriate appellate review in his appeal from judgment of sentence.

In McNair's Petition we set forth some of the more crucial requirements surrounding the approval of a grand jury investigation: "A grond jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety . . . or health, demoralize the personal security of members of the public, or permit systematic criminal depredations by public officers. . . . Such matters require immediate attention so that these evils may be suppressed. The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them. . . .

"A grand jury's investigation cannot be a blanket inquiry to bring to light supposed grievances or wrongs for the purpose of criticizing an officer or a department of government, nor may it be instituted without direct knowledge or knowledge gained from trustworthy information that criminal conspiracy, systematic violations of the law or other criminal acts of a widespread nature prevail, and at least one or more cognate offenses should exist on which to base a general investigation. The investigation cannot be aimed at individuals primarily, as such, nor at the commission of ordinary crimes . . . but should

be of matters or criminal nature wherein public officers or the interests of the general public are involved.

"Where it is made to appear to a court, as above indicated, that there exists a system of crime among public officers, or criminal conspiracies respecting public business, safety or health, or other criminal acts affecting these functions of a widespread nature, jeopardizing or demoralizing public security or health, the judge may properly order such investigation.

"Investigations for purely speculative purposes are odious and oppressive and should not be tolerated by law. . . . The grand jury must know what crimes it is to investigate. The court of quarter sessions has no power to set such an inquiry in motion unless it has reasonable cause to believe that an investigation will disclose some criminal misconduct which is within its jurisdcton to punsh.

"The grand jury must not be set upon fruitless searches, founded upon mere rumor, suspicion or conjecture. These are proper matters for police investigation. Before reflection is cast upon the integrity of public officials a preliminary investigation by the forces of law charged with the discovery of crime should be made to determine whether there is any real foundation. Such jury investigations involve great expense to the public; subject the citizen to inconvenience and frequently interfere with the normal functioning of public officials and bodies brought before it. They throw a cloud of suspicion upon the parties subject to attack and undermine public confidence in them.

There must be a sound, solid basis on which to proceed." Id. at 60-62, 187 Atl. at 504-05 (footnote and citations omitted).

Having reviewed in depth the nature and characteristics of an investigating grand jury, we believe it serves identifiable and legitimate state interests. We cannot agree that the omission of a preliminary hearing for a defendant indicted pursuant to a presentment, when the extraordinary and limited circumstances [26] justifying the impaneling of an investigating grand jury existed, in any way prejudices him, or denies him a greater degree of protection than is available to a defendant in a criminal proceeding instituted by complaint and preliminary hearing. In comparing the safeguards afforded by these alternative procedures, we must turn again to the Rules of Criminal Procedure.

Rule 119 [27] lists four rights of an accused at a preliminary hearing: assistance of counsel, cross-ex-

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[26] It has been suggested that the minimum requisites for obtaining a grand jury investigation are: (a) the subject matter of the investigation must affect the members of the community as a whole, rather than as individuals; (b) the investigation must be aimed at conditions and not primarily at individuals; (c) the ordinary processes of the law must be inadequate to cope with the problems; (d) the investigation must have a defined scope, be aimed at crimes, and supported by information indicating the existence of a system of related crimes or a widespread conspiracy; (e) information as to the crimes must come from direct knowledge or a trustworthy source. See Segal, Spivack and Costilo, supra, note 21 at 79.

[27] Rule 120 of the new Rules. It is not without interest that the rules pertaining to preliminary arraignment and preliminary hearing mention that these procedures occur after *an arrest*. To our knowledge, no arrest has occurred in the instant cases.

amination of witnesses and inspection of physical evidence, giving of testimony and recording the proceedings at his own expense.

We deal with the right to counsel in Section III of this opinion and accordingly defer a discussion of that subject.

As to recording the proceedings, a record was made of the special grand jury investigation here involved. Each witness is entitled to his own testimony. Furthermore, should any of the other evidence before the investigating grand jury be material to the impeachment of Commonwealth witnesses at trial, we will not presuppose that the trial court would not adequately protect any rights a defendant might have to utilize such evidence.[28]

Likewise, the other preliminary hearing advantages allegedly denied defendants are illusory. In *Commonwealth v. Dessus*, 423 Pa. 177, 181, 224 A. 2d 188, 191 (1966), we held that an indictment based solely on hearsay testimony was valid. That being the case, an accused's opportunity to cross-examine at a preliminary hearing is severely restricted. We believe that the policy considerations justifying the impaneling of a special investigating grand jury when ordinary law enforcement procedures are no longer capable of dealing with the problem as outlined above justifies this "curtailment," if indeed it is one, of an accused's cross-examination opportunity (*Cf. California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970).

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[28] Cf. *Pittsburgh Plate Glass Co. v. U. S.*, 360 U.S. 395, 79 S. Ct. 1237 (1959); see generally, Calkins, supra, note 21 at 476-85.

Additionally, in view of the limited quantum of evidence necessary to bind a defendant over, and a defendant's opportunity to testify on his own behalf, we believe any disclosure benefits available to a defendant in a preliminary hearing through the availability of inspecting the minimum if any, amount of physical evidence introduced by the Commonwealth are more than adequately balanced in the context of an indictment arising out of a grand jury investigation. In the latter situation, a defendant has the entire presentment as a basis upon which to prepare for trial as well as the right to request a bill of particulars under Rule 221. As the record now before us discloses, a presentment is a rather complete summary of the grounds on which the investigating grand jury is making its recommendation, and includes descriptions of both the physical evidence and testimony that prompts its action.

It has been urged by various appellees that the proper procedure required by both the criminal rules and considerations of equal protection is that subsequent to the investigating grand jury presentment, a complaint should be issued and preliminary hearing held before the matter is submitted to an indicting grand jury. To accede to appellee's request would merely be subjecting the administration of criminal justice to another superfluous layer of delay and imposing an uwise burden upon our judicial process as well as upon the prosecutor and counsel for the defense with only a slight expectation for what at most be a highly speculative *de minimus* advantage to an accused.

We reiterate that an investigating grand jury is an arm of the court, in this Commonwealth is judicially supervised from its inception contrary to the practice in most jurisdictions and is strictly regulated in the scope of its inquiry. The rights of an accused will certainly be as well protected before an investigating grand jury as during a preliminary hearing. Both are conducted before persons not necessarily schooled in the law. At least in the investigating grand jury context, the procedure is subject to supervision by a court.

Finally, we do not view *Coleman v. Alabama,* supra, as compelling a different result. *Coleman* did not decide that a preliminary hearing was constitutionally required; it held that when an accused has a preliminary hearing, he is entitled to counsel. This Court has ruled *Coleman* to be non-retroactive in *Commonwealth v. James,* 440 Pa. 205, 269 A. 2d 898 (1970). Moreover, *Coleman* made clear that appellate review of the denial of counsel at a preliminary hearing was subject to the harmless error test of *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824 (1967). 399 U.S. at 3, 90 S. Ct. at 2004. As will appear more fully below, we apply an analogous test, for relief is denied only to those appellees now before us whose indictments were not based in part on self-incriminatory statements made before the investigating grand jury without sufficient warning from the court

In sum, an investigating grand jury presentment is a constitutionally permissible and reasonable alternative to a preliminary hearing. We turn

now to a witness's right to the assistance of counsel and privilege against self incrimination during his appearance before an investigating grand jury.

III. RIGHT TO COUNSEL AND RIGHT AGAINST SELF INCRIMINATION BEFORE AN INVESTIGATING GRAND JURY

When the five individual appellees were subpoenaed to testify before the April, 1969, investigating grand jury, each requested the court (SLOANE, J.) that he be permitted to have counsel with him in the grand jury room, or in the alternative that he be allowed to consult with counsel at will outside the door. These motions were properly refused. The court then instructed defendants as to their duties as witnesses. The relevant portions of these instructions are set forth in the margin.[29]

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[29] The record in this appeal reveals the following:

To Mr. McCloskey:

"The Court: Now, here, too, gentlemen, you are represented by very able counsel, Mr. Gittis. You have a right, each of you—both of you—to talk to Mr. Gittis before you go into the Grand Jury room, and you confide in Mr. Gittis after you come out—but with nobody else—not even your wives.

• • •

"I have said you have able counsel. You may consult with him or his associate before you go into the Grand Jury room, and after you come out, but not while you are there."

To Mr. Marzullo:

"The Court: Mr. Marzullo, I will tell you what, most likely, you just heard when I said it to Mr. Breen. And that is, you certainly have a right to have a lawyer—and you have one, and a good one. You have a right to consult with him before you go into the Grand Jury room, and have questions presented to you and answers made, as indicated by the oath I have just given you.

In his July, 1970, opinions, Judge SPAETH ruled that appellees were entitled under the Fifth and Sixth Amendments to consult with their lawyers outside the grand jury room during their testimony. He based his ruling on the United States Supreme Court decisions in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) and *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964), as well as the decision of the New York Court of Appeals in *People v. Ianniello*, 21 N.Y. 2d 418, 235 N.E. 2d 439, cert. denied, 393 U.S. 827, 89 S. Ct. 90 (1968). We cannot agree.

Neither *Escobedo* nor *Miranda* were even remotely concerned with right to counsel before an

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You may tell your lawer—and nobody else—on the basis of the great tradition of the lawyer-client relationship—what went on in the Grand Jury room—but no one else. And that includes your wife.

"You may not have a lawyer with you while you are in the Grand Jury room."

To Mr. Taylor:

"The Court: • • •

"As you may have heard, each one of you has the right to sonsult a lawyer, counsel, before you go into the Grand Jury room, and to confide in that same counsel after you come out. You may not confide in anyone else excepting your lawyer—not even your wife. I say 'wife' because generally she is the most intimate person that a man knows—when he is married. Otherwise, everything is secret, under the law, under the Grand Jury proceeding."

To Mr. Blatstein:

"The Court: • • •

"As you know, Mr. Blatstein, you may consult with your counsel, Mr. Richter, before you go into the Grand Jury room. And you may confide in Mr. Richter when you come out of the Grand Jury room. *While you are in the Grand Jury room, you are in there alone. If there is any problem or question, it will be brought before the court.*" (Emphasis added.)

Mr. Steinberg was administered the oath without any cautionary instructions.

investigating grand jury. The interpretation urged by appellees that counsel be accessible at all times during a witness' appearance is an unwarranted extension of the teaching of those decisions. As to *Ianniello*, we believe it supports the result we reach today, as appears more fully below.

In *In re Groban's Petition*, 352 U.S. 330, 77 S. Ct. 510 (1957), the last pronouncement by the Supreme Court witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel. . . . When . . . charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense." Id. at 333, 77 S. Ct. at 513.

It would be a serious interruption and impair continuity in a grand jury investigation if witnesses were permtted to leave the room and consult with counsel prior to responding to every question.

However, in *In re Groban's Petition*, supra, the Supreme Court also stressed that a witness before a grand jury is always protected by the privilege against self incrimination, ". . . a privilege available *in investigations as well as in prosecutions.*" Id. at 333, 77 S. Ct. at 513 (emphasis added). See generally, Annot., Self Incrimination Before a Grand Jury, 38 A.L.R. 2d 229 (1954).

In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness' right to exercise his privilege against self incrimination knowingly and intellgently, we beleve that proper procedure is for the court supervising

the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question.

Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury.[30] He has been summoned to testify, and he is subject to contempt proceedings should he refuse to testify without justification.[31] The question of when a witness has "reasonable cause to apprehend danger" and hence can exercise his right against self incrimination is not always clear.[32] As was stated in *Jones v. United States*, 342 F. 2d 863 (D.C. Cir. 1964): "If . . . [a witness] answers incriminating questions he may make certain, as Short did, that he will be indicted. And testimony before the grand jury may be used, though Short's was not, to impeach his testimony at trial. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate

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[30] See generally, Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1967).

[31] See, e.g., *United States v. Testa*, 326 F. 2d 730 (3d Cir. 1963), cert. denied, 376 U.S. 931, 84 S. Ct. 701 (1964).

[32] See *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489 (1964).

him, the grand jury may draw conclusions. If he refuses to answer questions that are not incriminating, he may be guilty of contempt." Id. at 868 (EDGERTON, J., joined by BAZELON, C. J., and FAHY and WRIGHT, J.J.).[33]

Determining what is an incriminating statement is not always clear to a layman. We thus conclude that a subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self incrimination.

As noted above, appellees urge that the New York Court of Appeals' decision in *People v. Ianniello*, supra, is persuasive authority for the proposition that a witness before an investigating grand jury be allowed to consult with his attorney outside the hearing room after each question. Having examined that decision we find, to the contrary, that it supports the result we reach today.

The holding of that decision was that *Ianniello* in fact had not been deprived of any right to consult with his lawyer. See 21 N.Y. 2d at 424, 235 N.E.2d at 441. Judge BRIETEL then observed that "[*c*]*ourts* have a particular responsibility to prevent unfairness in Grand Jury proceedings, for the Grand Jury is an 'arm of the Court' ". Id. at 424, 288 N.Y.S. 2d at 1468, 235 N.E. 2d at 443 (emphasis added). The court further pertinently noted

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[33] The quoted portion of the opinion, although included in the opinion of the court, was in a section joined in only by four members of the court, which was not a majority.

that if a witness is told he cannot see his lawyer, ". . . he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanctions of contempt proceedings." Id. at 425, 235 N.E. 2d at 443-44.

We reiterate our belief that to allow a witness to leave the grand jury room and consult with his attorney at the door prior to responding to every question would cause undue delay and all but terminate the institution of the investigating grand jury. Such a procedure, which would not be subject to any court supervision, would be an invitation to evasive and stalling tactics. The standards we today institute are manifestly distinguishable in that they require a court to scrutinize the witness's refusal to answer. If the witness persists in interrupting the grand jury proceedings in palpable bad faith and without presenting any colorable claim of testimonial privilege, the court can bring a halt to such tactics. This essential element

of judicial supervision would not be available were a witness permitted at will to consult with his attorney for an indefinite period of time after every question, no matter how unmeritorious his objection.

Consequently, we must now consider the proper remedy.[34]

IV. THE PROPER REMEDY

Even though a witness was not given the proper warning, we would not disturb a later indictment unless the presentment and subsequent indictment were based, in part, on the self-incriminatory testimony of the defendant.

In the present case, appellee Blastein received the proper warning.[35] As to appellee Steinberg, although the record does not indicate whether he was advised is not based on any testimony that appellee Steinberg he could come before the court during his testimony, our review of the second presentment discloses that it might have given,[36] but rather on the records of the Philadelphia Housing

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[34] The Commonwealth raised the argument that Judge Spaeth being a court of coordinate jurisdiction, was without power to "overrule" Judge Sloane on the question of preliminary hearings and right to counsel. The cases were assigned to Judge Spaeth for all pre-trial motions. The preliminary hearing issue was never presented to Judge Sloane, for no presentments or indictments had yet been made. Furthermore, the factual contexts were distinct and the records and posture of the cases were totally different.

[35] See note 29, supra.

[36] The record discloses that Steinberg respectfully declined to give any testimony before the April, 1969, investigating grand jury, other than his name and address.

Authority, produced under subpoena, evidence submitted by the district attorney's office, and the testimony of Hope B. Winborne, Chief of Construction of the Department of Licenses. Consequently, neither of these appellees is entitled to relief.

However, appellees Thomas Taylor, Paul J. Marzullo and James C. McCloskey were all given an insufficient warning, and their indictments were based on the fourth presentment of the investigating grand jury. Our examination of that presentment discloses that the recommendations concerning each of these appellees were clearly based in part on their incriminating testimony before the investigating grand jury. We therefore conclude that their indictments must be quashed and their testimony suppressed.

The Commonwealth refers us to this Court's decision in *Commonwealth v. Dessus,* supra, and argues that even if some irregularity existed in the procurement of the indictments, to quash is not the proper remedy.

This Court has made it clear that in certain circumstances, a constitutional violation in securing the indictment will necessitate that the indictment be quashed. In *Commonwealth v. Kilgallen,* 379 Pa. 315, 108 A. 2d 780 (1959), we held that where a witness appeared before the grand jury, testified under judicial compulsion in violation of his rights pursuant to the Fifth Amendment and Article I, Section 9 of the Pennsyvania Constitution against self incrimination, his indictment should be quashed.

Mr. Justice CHIDSEY there stated for six members of the Court that: "It is true, as stated by the Superior Court in the Gross case, that '. . . Proof that a grand jury heard irrelevant testimony, Com. v. Spallone, 154 Pa. Superior Ct. 290, 35 A. 2d 731; or hearsay evidence, Com. v. Stoner, 70 Pa. Superior Ct. 365, affirmed 265 Pa. 139, 108 A. 624; or incompetent witnesses, Com. v. Padden, 160 Pa. Superior Ct. 269, 50 A. 2d 722, will not invalidate an indictment where other proper evidence was adduced before it . . .'. *But we know of no case in this jurisdiction that denies the right to challenge the validity of an indictment on the ground of violation of the accused's constitutional rights here asserted*—and so challenge successfully upon proper and sufficient proof." Id. at 325-26, 108 A. 2d at 785 (emphasis added).

The principle of *Kilgallen* is still valid and dictates our result today on this issue. Defendants McCloskey, Taylor and Marzullo were on notice that the investigating grand jury was inquiring into the stadium project. They were judicially compelled to testify without sufficient warning or protection concerning their right against self incrimination. The resulting presentment and indictments were based in part on this constitutionally impermissible testimony and hence must be quashed.

V. CONCLUSION

Accordingly, for the reasons set forth above: the orders of the Superior Court affirming the orders of the Philadelphia Court of Common Pleas of July 27,

1970, quashing the indictments against Harry Blatstein, Frank M. Steinberg, McCormick-Taylor Associates McCloskey & Company, Inc., and H. H. Robertson Company are reversed and the records remanded for further proceedings; the orders of the Superior Court affirming the orders of the Philadelphia Court of Common Pleas of July 27, 1970, quashing indictments and suppressing evidence against James C. McCloskey, Paul J. Marzullo and Thomas Taylor are affirmed.

Mr. Justice COHEN took no part in the decision of this case.

Concurring and dissenting Opinion by Mr. Justice Eagen:

I agree with the conclusion of the majority that the denial of a preliminary hearing to the individuals and corporations indicted in this case violated neither the Pennsylvania Rules of Criminal Procedure nor constitutional due process. However, I strongly disagree with the majority's ruling that an individual who is compelled to appear and testify before a grand jury may constitutionally be denied the opportunity of consulting with his legal counsel outside the grand jury room during his testimony. I agree completely with Judge SPAETH in the court of original jurisdiction that such a denial violates the individual's rights guaranteed by the Fifth and Sixth Amendments.

A person accused of crime must be afforded the assistance of counsel during every "critical stage" in the prosecution process. Admittedly a witness before a grand jury is not an "accused" in a technical

sense. However, the law should consider the realities of the situation and a reading of the limited record before us is convincing to me that the individuals here involved were "accused" in a very real sense when they testified before the grand jury. Moreover, they were at least potentially defendants; their testimony was compelled and eventually they were indicted at least in part on what they themselves were compelled to disclose. Under such circumstances, they were entitled to the minimum protection of having the opportunity of consultation with counsel before answering any questions.

Additionally, a witness before a grand jury need not answer any incriminating questions. Resolution of the scope of the privilege against self incrimination and the applicability of the waiver doctrine on a question-by-question basis frequently presents a difficult problem. I cannot see how an untrained layman can be expected to possibly discern whether or not an answer to a particular question will subject him to the danger of incrimination. To deny him the opportunity of adequate consultation with his counsel is to render his right under the Fifth Amendment meaningless.

Aside from every other consideration, fundamental fairness, which is the cornerstone of due process, mandates that the opportunity of such assistance be afforded. The secret proceeding before a grand jury is pregnant with the possibility of coercion, intimidation and overreaching. One commentator pointedly described the situation thusly: "A potential defendant who is brought before the

Grand Jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of course, directed by a skilled prosecutor capable of utilizing the Grand Jury as the tool to obtain incriminating evidence from the mouth of a nervous witness. The upset and confused witness does not know whether to respond to the questions and risk having his answers used against him at a trial or claim the Fifth Amendment, creating suspicion in the eyes of the jurors and risking a contempt charge. In this atmosphere, the proceeding takes on the attributes of a Star Chamber. There is no comparable institution in our entire society which sanctions secret interrogation of a person 'legally' denied access to counsel." Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 190 (1966).

Finally, an inconsistency in the reasoning of the majority opinion must be noted. On the one hand, the opinion states that if a witness were permitted to leave the grand jury room to consult with counsel this "would be a serious interruption and impair continuity in a grand jury investigation." But in the next breath the opinion states that if a witness is confronted with a question which tends toward incrimination he may "come before the court and obtain a ruling as to whether or not he should answer the question." Apparently, in the minds of the majority the last mentioned procedure would

not constitute a "serious interruption" of the grand jury investigation.

In this connection may I also say that, while I agree that courts and their agencies should persistently strive towards the objective of increased efficiency, such efficiency should always be within legal limits and "should never be made the end goal of a system dealing with life and liberty."

Mr. Justice JONES joins in this opinion.

D. Order of the Supreme Court of Pennsylvania on Petitions for Reargument

June 14, 1971

Petitions Denied.

PER CURIAM

SUPREME COURT, U. S.
FILED
OCT 12 1971

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-374.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JAMES C. McCLOSKEY, PAUL J. MARZULLO, and THOMAS TAYLOR,
Respondents.

BRIEF OF RESPONDENT JAMES C. McCLOSKEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD GITTIS,
STEVEN A. ARBITTIER,
Attorneys for Respondent James C. McCloskey.

Of Counsel:
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I. OPINIONS BELOW.

The citation in the petition for writ of certiorari to an order refusing reargument is misleading. Neither petitioner nor respondent petitioned for reargument. Reproduced in the appendix hereto is a letter dated June 16, 1971 giving notice of the denial of certain petitions for reargument filed by others. No other petitions for reargument were filed.

II. JURISDICTION.

The Court lacks jurisdiction because the petition for writ of certiorari was not filed in time and the judgment of the Supreme Court of Pennsylvania was based on an independent and adequate state ground.

III. ARGUMENT.

1. The Petition Is Not Timely.

A petition for writ of certiorari to review a state court judgment in a criminal case must be filed within ninety days after the entry of such judgment. *Rules of the Supreme Court of the United States*, Rule 21. This period may be extended only by a justice of this court for good cause shown. *Ibid.*

In the present case, petitioner seeks review of the order of the Supreme Court of Pennsylvania quashing indictments against respondent. This order was entered on May 13, 1971. The present petition was filed on September 13, 1971, one hundred twenty-three days after the entry of the order.

The filing of petitions for reargument by other defendants does not cure this fatal flaw. The undisputed fact

is that neither this respondent, nor any of the other respondents named in the petition for writ of certiorari, filed a petition for reargument. There was no reason for them to do so because the order of the Supreme Court of Pennsylvania *upheld* the quashing of their indictments. Petitioner, as the party aggrieved by that order, could have petitioned for reargument but did not.

Certain defendants [1] whose cases were argued before the Supreme Court of Pennsylvania at the same time as respondent's did petition for reargument. The only issue raised by these defendants was that the quashing of their indictments should have been upheld because they were denied a preliminary hearing. The Supreme Court of Pennsylvania disagreed and entered an order dismissing the petitions for reargument.[2] Petitioner is not seeking review of this order and, therefore, the date on which it was entered is irrelevant.

Furthermore, the preliminary hearing issue is totally distinct from the issues of right to counsel and privilege against self-incrimination which form the basis of the quashing of respondent's indictments. Compare parts II and III of the Opinion of the Supreme Court of Pennsylvania, Appendix to Petition for Certiorari, pp. 48a-64a; 64a-70a. The filing of petitions for reargument by unrelated defendants raising completely different legal issues cannot extend petitioner's time for filing a petition for writ of certiorari

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1. McCormack-Taylor Associates, H. H. Robertson Company, and Frank M. Steinberg petitioned for reargument. McCloskey & Co., Inc. (the only defendant company with which respondent was associated) did not petition for reargument.

2. The reinstatement of the indictments against these defendants is the subject of petitions for writs of certiorari which were timely filed. See Petitions for Writ for Certiorari of McCloskey & Co., Inc. and McCormack-Taylor Associates (October Term, 1971, No. 71-201) and Petition for Writ of Certiorari of Frank M. Steinberg (October Term, 1971, No. 71-153).

with this court. *Cf., F. T. C. v. Minneapolis-Honeywell Regulator Co.,* 344 U. S. 206 (1952), 73 S. Ct. 245.

2. There Is an Adequate and Independent Non-federal Ground for the Judgment of the Supreme Court of Pennsylvania.

In its opinion, the Supreme Court of Pennsylvania framed the issue involved in the present case as follows:

> "[W]hether, or to what degree, a subpoenaed witness and potential defendant before an investigating grand jury is entitled to the assistance of counsel to aid him in asserting his right against self incrimination guaranteed both by the Fifth Amendment, applied to the states through the Fourteenth Amendment, *and Article I, Section 9 of the Pennsylvania Constitution.*"[3] (Emphasis added.) Appendix to Petition for Writ of Certiorari, p. 40a.

Thus, the Supreme Court of Pennsylvania expressly recognized that its holding was based on the privilege against self-incrimination provided in both the federal and state constitutions.

This court from the time of its foundation has adhered to the principle that it will not review state court judgments that rest upon adequate and independent state grounds. *Herb v. Pitcairn,* 324 U. S. 117, 125, 65 S. Ct. 459, 463 (1945). Indeed, when it appears that the judgment *might* have rested upon a non-federal ground, this court will not take jurisdiction to review that judgment. *Durley v. Mayo,* 351 U. S. 277, 281, 76 S. Ct. 806, 809 (1956).

A case directly in point is *Jankovich v. Indiana Toll Road Commission,* 379 U. S. 487, 85 S. Ct. 493 (1965). In

3. Article I, Section 9 of the Pennsylvania Constitution provides in relevant part: "In all criminal prosecutions, the accused . . . cannot be compelled to give evidence against himself . . . ."

that case, the Supreme Court of Indiana had invalidated a zoning ordinance on the ground that it effected a taking of private property in violation of the just compensation requirement of the Indiana Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution. This court, after granting certiorari, dismissed the writ as improvidently granted on the ground that the Indiana constitutional provision was an independent and adequate ground for decision thereby depriving this court of jurisdiction. This decision was reached notwithstanding the fact that the Indiana Supreme Court had not analyzed separately the effect of the two constitutional provisions.

IV. CONCLUSION.

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

HOWARD GITTIS,
STEVEN A. ARBITTIER,
Attorneys for Respondent
James C. McCloskey.

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Supreme Court of Pennsylvania

Eastern District

PATRICK N. BOLSINGER
PROTHONOTARY
GEORGE W. DUNN, JR.
DEPUTY PROTHONOTARY

PHILADELPHIA. 19107

June 16, 1971

Thomas J. Mullaney, Esq., 405 Witherspoon Building, 1321 Walnut Street, Philadelphia, Pennsylvania 19107
and
Henry T. Reath, Esq., Duane, Morris & Heckscher, 1617 Land Title Building, Philadelphia, Pennsylvania 19110
and
Donald J. Goldberg, Esq., Suite 1208, One N. 13th Street, Philadelphia, Pennsylvania 19107

In Re: Commonwealth of Pennsylvania, Appellant
vs. James C. McCloskey, et al.
No. 157, January Term, 1971

Gentlemen:

This is to advise that the following Order has been endorsed on each of the Petitions for Reargument, filed on behalf of Appellees, McCormick-Taylor Associates, H. H. Robertson Company, and Frank M. Steinberg, in the above captioned case:

"14 June 1971.

Petition denied.

s/ Per Curiam."

Very truly yours,

Patrick N. Bolsinger
Prothonotary

PNB:ENT

cc: John Rogers Carroll, Esq., c/o Arlen Specter, District Atty., 666 City Hall, Philadelphia, Pa. 19107
cc: James D. Crawford, Esq., Deputy Dist. Attorney, 666 City Hall, Philadelphia, Pa. 19107
cc: Howard Gittis, Esq.,Wolf, Block, Schorr & Solis-Cohen, 12th Flr. Packard Bldg., Philadelphia, Pa. 19102
cc: James Francis Lawler, Esq., Ostroff & Lawler, 37 S. 20th St., Philadelphia, Pa. 19103
cc: Louis M. Natali, Jr., Esq., Dilworth, Paxson, Kalish & Levy, 2600 The Fidelity Bldg., Philadelphia, Pa. 19109
cc: John Patrick Walsh, Esq., Walsh & Savitt, 1410 Girard Trust Bldg., Philadelphia, Pa. 19102
cc: Edwin P. Rome, Esq., 4 Penn Center Plaza, Philadelphia, Pennsylvania 19103

Supreme Court, U.S.
FILED
OCT 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-374

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

THOMAS TAYLOR
Respondent.

ANSWER TO WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OSTROFF & LAWLER
BY:
ISIDOR OSTROFF
37 South 20th Street
Philadelphia, Pennsylvania 19103

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

ARGUMENT

I. The Petition should be denied because it was filed late.

The opinion of the Supreme Court of Pennsylvania from which the Commonwealth appeals was decided on May 13, 1971. Thomas Taylor never filed any Petition for Reconsideration. Petitions for Reconsideration filed by other defendants did not raise the issue presented in this petition.

This Court's Rule 22 requires the filing of a Petition for Certiorari within 90 days. This Petition was 30 days too late.

II. The Petition should be denied because the Supreme Court of Pennsylvania was interpreting the Pennsylvania Constitution.

On page 39a of the Petition for Certiorari the opinion of Justice Roberts is printed. In that opinion, the following sentence appeared:

> "This complex appeal involves numerous issues, all of which center on two problems: (1) whether a criminal proceeding can lawfully be commenced by an investigating grand jury's presentment to an indicting grand jury without affording defendant an opportunity for a preliminary hearing; and (2) whether, or to what degree, a subpoenaed witness and potential defendant before an investigating grand jury is entitled to the assistance of counsel to aid him in asserting his right against self incrimination guaranteed both by the Fifth Amendment, applied to the states through the Fourteenth Amendment, *and Article I, Section 9 of the Pennsylvania Constitution.*"

Article I, Section 9 of the Pennsylvania Constitution provides as follows:

"In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witness in his favor, and, in prosecuting by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Since the indictment against Thomas Taylor has been quashed on state grounds, it would be a useless act of this Court to review the quashing under Federal constitutional grounds.

Respectfully submitted,

OSTROFF & LAWLER

By: ISIDOR OSTROFF